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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

NATURE'S DAIRY, et al.,
Petitioners,

v.

DAN GLICKMAN, AS SECRETARY OF AGRICULTURE, UNITED STATES DEPARTMENT OF AGRICULTURE, AND NATIONAL DAIRY PROMOTION BOARD,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BENJAMIN F. YALE
Counsel of Record

KRISTINE H. REED
BENJAMIN F. YALE & ASSOCIATES CO., L.P.A.
102 WEST WAPAKONETA STREET
P.O. BOX 100
WAYNESFIELD, OH 45896-0100
(419) 568-5751

Attorneys for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO 800-890-5001

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QUESTION PRESENTED FOR REVIEW

Whether under the First Amendment business entities can be compelled to fund generic advertising and nutrition education when such compulsion is outside of any broader collective enterprise and the compelled speech component is not part of a regulatory scheme that otherwise constrains their freedom to act independently?

PARTIES TO THE PROCEEDINGS WITH RULE 29.6 STATEMENT

Petitioners herein, the plaintiffs and appellants below, include the following persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent corporations, nonwholly owned subsidiaries or other legal entities who or which are financially interested in the outcome of the litigation: Nature's Dairy; Bos Dairy, L.C.;Desert View Dairy, L.C.;Rio Grande Dairy; Desert View Dairy II; Gore's, Inc.; County Line Dairy I; County Line Dairy II; Dover Dairy; den Dulk Dairy Farm, L.L.C.; River Ranch Dairy; John DeJong Dairy; JVD Dairy; Willemina Dairy; Sebastian Faria; Raymond J. or Eleanor M. Vaz; Vista Grande Dairy, Bob Wade; David J. Wilcox and Elaine S. Wilcox; Ceres Farm II, Michael Pank; KF Dairy, James F. Kuhn; Lane Dairy, Inc.; Donna Smith and Bradley Smith; Tim A. Rater, Rater's Dairy; Norman L. Teed; Forest M. Schell; Bruce Manwaring; Jim Hoffman, Boca Linda Dairy; Ernest Shreve & Son's; Willard Hitchcock; Jonathan & Stephanie Odell; and William B. Eddy.

The Respondents herein, the defendants and appellees below, are the National Dairy Promotion Board and Dan Glickman in his official capacity as the Secretary of the United States Department of Agriculture.

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The Petitioners respectfully petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to address the question raised herein.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Sixth Circuit (Nelson and Daughtrey, Circuit Judges and Sargus, District Judge) was entered March 2, 1999. *Nature's Dairy v. Glickman,* 173 F.3d 429, 1999 WL 137631 (6th Cir. 1999). App. 1a. The Court of Appeals denied a timely Petition for rehearing or hearing *en banc* on June 11, 1999. App. 19a. The Court of Appeals affirmed the decision of the United States District Court for the Western District of Michigan (Hon. Robert Holmes Bell) filed January 6, 1998. *Nature's Dairy v. Dan Glickman,* 1:96-CV-499 (E.D. Mich., January 6, 1998), App. 9a-16a.

JURISDICTION

The judgment sought to be reviewed in this case was issued March 2, 1999. The order denying *en banc* consideration or rehearing was issued June 11, 1999. The statutory basis for the issuance of this writ is 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, First Amendment

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

7 U.S.C. §608c(5) and §608c(6)

The text of this statute is set forth as App.21a-26a.

Dairy Stabilization Act of 1983, Title I, Subtitle B of the Dairy and Tobacco Adjustment Act of 1983, Pub. L. 98-180, 97 Stat. 1128, 7 U.S.C.§4501 *et seq.*

The text of this statute is set forth as App. 27a-47a.

Code of Federal Regulations, Title 7 Agriculture, Part 1150 Dairy Promotion Program, Subpart Dairy Promotion and Research Order

The text of these regulations is set forth as App. 48a-72a.

STATEMENT OF THE CASE

1. The Congress authorized issuance of regulations that compelled all dairy producers to fund generic advertising of dairy products. Dairy Stabilization Act of 1983, Title I, Subtitle B of the Dairy and Tobacco Adjustment Act of 1983, Pub. L. 98-180, 97 Stat. 1128, 7 U.S.C.§4501 *et seq*. (Act), App. 27a-47a.

The Secretary of Agriculture promulgated regulations implementing the Act. 49 Fed. Reg. 11816 (March 28, 1984) 7 C.F.R. Part 1150, App. 48a-72a. ("Promotion Order", together with the Act, the "Dairy Promotion Program").

The sole purpose and activity of the Dairy Promotion Program is to promote dairy products, nutrition education, and research in support of the promotion.

Control of the content of the speech and its distribution is vested in the Secretary of the United States Department of

Agriculture, a cabinet level Presidential appointee. The Secretary appoints thirty-six dairy producers to the National Dairy Promotion Board as an advisory board. 7 C.F.R. 1150.135, App. 53a. The Secretary must approve all promotional plans, 7 C.F.R. 1150.140(e), App. 56a, and regional promotion programs. 7 C.F.R. 1150.140(i), App. 57a. He is responsible for review and reporting the Program to Congress. 7 U.S.C.§4511, 4514. App. 39a and 40a. The Secretary also is empowered to terminate the program when he finds it no longer furthers the policy of the Act. 7 U.S.C.§4507, App. 36a; 7 C.F.R. §1150.161, App. 63a-65a.

The Promotion Program was initially approved by a majority of dairy producers in a referendum. The Act has no sunset provision. The program continues until six months after a referendum votes it out. 7 U.S.C.§ 4506(b), App. 36a. In this federally operated electoral process, producers are allowed to cast one vote in favor of or against continuation of the Dairy Promotion Program. Cooperatives vote on behalf of all non dissenting members, including the apathetic. 7 U.S.C.§4508, App. 37a.

The compelled speech is funded by all dairy producers, including the Petitioners. 7 U.S.C.§4631(12), App. 42a. The Act fixes payment at the rate of fifteen cents per hundred weight on all milk marketed. 7 U.S.C. §4504(g), App. 32a-33a. The regulations so provide. 7 C.F.R. 1150.152, App. 58a. Failure to pay the assessments subjects the producers to severe fines and penalties. 7 U.S.C.§4510, App. 38a-39a; 7 C.F.R. §1150.156, App. 63a.

Approximately 116,000 dairy farmers presently produce the Nation's milk supply. 64 Fed. Reg. 24933 (May 10, 1999). Aside from funding the Dairy Promotion Program, these producers do not so participate together in any other collective scheme as inclusive or broader than the Dairy Promotion

Program. Economic regulations of dairy are neither uniform nor universal. There are some federal milk marketing orders under the Agricultural Marketing Agreement Act , 7 U.S.C. §601 *et seq*. in some regions of the country.

Relief to a producer from the mandatory funding is only available through an act of Congress, termination by the Secretary, a majority vote of producers in a referendum, or termination of the dairy enterprise.

The Dairy Promotion Program promotes more than raw milk produced by the Petitioners, it promotes "dairy products" which include not just milk, cheeses, yogurt, and ice cream, but consumer products that contain milk or milk products and other ingredients— *e.g.*, pizza, bread and cake mixes, cheeseburgers, fajitas, and baked goods. Dairy products are not only made from milk of producers, but can include imported dairy products, artificial cheeses, and cheeses from goat and sheep milk.

2. On June 26, 1996, the Petitioners commenced an action before the United States District Court (W.D. Michigan) seeking a declaration that the Dairy Promotion Program violates the First Amendment to the Constitution and asking for remedies in the form of injunctive and monetary relief. That court had jurisdiction pursuant to 28 U.S.C. §§1331 and 1337(a) because the claim arose under the Constitution and laws of the United States, and pursuant to 28 U.S.C. §1346 because an officer and agency of the United States were proper party defendants.

On cross motions for summary judgment, the District Court granted summary judgment in favor of the Secretary and the Board. App. 9a-16a. The District Court, citing this Court's decision in *Glickman v. Wileman Bros. & Elliott,* 521 U.S. 457 (1997), held that the compelled funding was not prohibited by

the First Amendment and that it was not necessary to consider whether the compelled speech was part of a broader collective enterprise. *Nature's Dairy, et al. v. Dan Glickman, et al,* 1:96-CV-499 (E.D. Mich., January 6, 1998), App. 15a.

3. The Petitioners timely appealed to the United States Court of Appeals for the Sixth Circuit. That court had jurisdiction by virtue of 28 U.S.C. §1291. On March 2, 1999, the Court of Appeals affirmed the decision of the District Court. *Nature's Dairy v. Glickman,* 173 F.3d 429, 1999 WL 137631 (6th Cir. 1999). App. 1a. A timely petition for rehearing or hearing *en banc* was denied on June 11, 1999. App. 19a-20a.

REASONS FOR GRANTING THE WRIT

I.

This Court's holding and opinion in *Glickman v. Wileman Bros. & Elliott,* 521 U.S. 457 (1997) left open the question of whether a business entity can be compelled to fund generic advertising which is not part of a broader collective enterprise and the speech component is not part of a regulatory scheme that otherwise constrains their ability to act independently. This case addresses that question.

This Court has not yet considered, let alone held, whether in the absence of a broader collective activity an individual can be compelled to fund commercial speech. The courts below have found that the stand alone generic dairy advertising is an economic regulation sufficient to cloak the compelled speech from First Amendment analysis. That the compelled speech is distinct and separate from such other economic regulation and not part of a broader collective program has escaped the rationale of the lower courts. The district court opined that to require the speech be part of a larger statutory scheme would mean that the legislature would

simply enhance the regulatory constraint in order to require the speech and that such additional regulation was not necessary to the analysis. *Nature's Dairy,* App. 15a.

There is no clear rule expressed by this Court that applies to compelled funding such as found here. In *Wileman Bros. & Elliott* the Court did not agree with the Court of Appeals' use of the standards for restricting commercial speech in *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). *Wileman Bros. & Elliott* at 521 U.S. 469. Since there is compelled speech outside of the marketing order it would appear that *Riley v. National Federation of Blind of N.C., Inc.*,487 U.S. 781 (1988) and *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943) would provide guidance.

For agriculture, this question is of great moment. For dairy alone, dairy producers paid $230 million in 1996. Agriculture Marketing Service, Dairy Program, Promotion and Research, http://www.ams.usda.gov/dairy/ndb. htm#overview. In 1998 the amount exceeded 240 million dollars. The Secretary not only promotes dairy but a number of other commodities. The USDA estimates payments for the federal promotion programs for eggs, soybeans, pork, beef, mohair, and lamb collectively exceed $218 million annually. Agriculture Marketing Service, Poultry Program, Egg Promotion and Research, http://www.ams.usda.gov/poultry/pyrp.htm; Agriculture and Marketing Service, Livestock and Seed Program, Research and Promotion Programs, http://www.ams.usda.gov/lsg/mpb/lsrp.htm. No amounts could be found for federal promotion for the honey, popcorn, potato, and watermelon programs. New programs for olive oil, peanuts, and blueberries are in various stages of approval. There are also countless state promotion programs. Most of these are stand alone programs like the dairy program and different from the fruit promotion

program in *Wileman Bros. & Elliott.*

The money spent to change minds of consumers and others is not insignificant. The named programs approach one half a billion dollars every year in compelled generic advertising. In comparison, the Federal Election Commission reported that for one quadrennial election, Bob Dole and William Clinton combined spent slightly more than the Dairy Promotion Program for a year, or nearly $255 million. FECInfo, Public Disclosure, Inc., www.tray.com/FECInfo/

The decisions of the lower courts and their approach has broad national policy implications. If permissible compelled commercial speech need not arise out of a broader collective activity, then the power of the Congress to compel any group to fund speech against their individual choice, notwithstanding the First Amendment, will be complete. The First Amendment in commercial speech will become subject to the power of Congress over commerce rather than the bounding of the latter by the former.

This case does not raise the question of compelled corrective speech where a business entity is required to say additional words either to correct earlier misleading or fraudulent statements or to insure consumers are fully informed.

II.

If economic regulation absent collective activity suffices to cloak the compelled speech from First Amendment scrutiny, then the government can compel speech in any event. Virtually all economic activity within the Nation is either subject to or susceptible to economic regulation. Where there is rent control, landlords could be compelled to promote cleanliness or crime prevention The regulation of consumer credit would thus permit compelled speech by credit card

issuers on the wise use of credit and instructions in personal budgeting. The exemption from antitrust would justify Major League Baseball being required to promote government designed programs on physical fitness, sportsmanship, or competition.

The rationale of the lower courts would, in the area of compelled speech, make the First Amendment subservient to the exercise of the Commerce Clause.

As a member of a collective activity, such as a union, bar association, or collective marketing program, the member must yield some of her or his freedom to the collective. This Court has held that an individual can be required to fund such collective activity including the collective speech necessary to the purpose of the collective. *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Wileman Bros. & Elliott, supra.*

In finding the bounds of permissible speech in those, and other related cases, this Court first considered the appropriateness of the collective to which the person was involuntarily made a member. In *Abood* the Court reviewed the history of exclusive bargaining agreements and found that interference with the individual rights by such labor agreements "...is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Abood*, 431 U.S. at 222. Similarly in *Keller*, the analysis of the free speech claim began with the propriety of California's integrated bar. *Keller*, 496 U.S. at 7-9.

In *Wileman Bros. & Elliott* this Court emphasized the predicate of the collective activity when it first determined that the advertising arose out of the marketing orders. It then framed the question as "whether we should review the

assessments used to fund collective advertising, *together with other collective activities*, under the standard appropriate for the review of economic regulation or under a heightened standard appropriate for the review of First Amendment issues." *Wileman Bros. & Elliott,* 521 U.S. at 469 [emphasis added].

The potential of industry regulation is not enough to invoke protection from First Amendment scrutiny. This Court stated that *"[i]n answering that question we stress the importance of the statutory context in which it arises." Id.* [emphasis added]. The context found relevant consisted of two aspects. The first was that the speech was part of marketing orders. ". . .California nectarines and peaches are *marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws.*" *Id.* [emphasis added].

The second aspect was that the speech was part of a broader collective activity. "The business entities that are compelled to fund the generic advertising at issue in this litigation *do so as a part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme.*" *Id.* [emphasis added]

The speech is not the individual's but the collective's speech. The properly existing collective must have a voice to maintain its viability as an enterprise. Communication is a necessary function for any body. To deny a properly constituted body its own voice, but, instead, allow its members to demand it either speak as they individually wished or not at all is to give the individual too much control in the enterprise and ultimately doom it. *Keller*, 496 U.S. at 12-13.

Permitting the government to compel speech without justification of collective activity will permit the government to control discourse by compulsory funding of its speech while it does not have to answer to the taxpayers as to why it is making the speech that it is. To allow compelled funding under such circumstances also permits the government to create pools of individuals who have nothing more in common than the shared burden of funding.

III.

The Dairy Promotion Program is *not part of a broader collective enterprise.* Except for the sole purpose of funding government speech, Petitioners are not joined in a collective enterprise with other dairy producers.

The regulations of which the generic advertising in *Wileman Bros. & Elliott* was but a part, collectively performed a number of marketing functions on behalf of the producers. These included provisions limiting quantities of the commodity which could be marketed in a season, allotting the quantities that a handler could purchase or market, handling the surplus of a commodity and equalizing the cost of such handling among producers and handlers, establishing reserve pools of products, providing inspection of commodities, providing a method for fixing the size, capacity, weight, dimensions, or pack of the containers used in handling the commodity, and, as relevant here establishing production and marketing research. 7 U.S.C. §608c(6), App. 22a-26a. The fruit promotion was but one part of a broader economic regulatory scheme.

The statutory context in *Wileman Bros. & Elliott* contrasts with that in the instant case. The Dairy Promotion Program is not part of such detailed marketing orders. Though there are federal milk marketing orders under 7 U.S.C. §608c, these are neither universal nor uniform in their application. The federal milk marketing orders operate independent of the

milk promotion order and vice versa. It is legally possible to have no federal milk marketing orders but still have the dairy promotion order. Conversely, the existence of the federal milk marketing orders does not mean the promotion orders continue. Termination of a federal milk marketing order is pursuant to 7 U.S.C. §608c(13) while continuation of the Dairy Promotion Program is based upon a separate statute. 7 U.S.C. §4507(b).

The Dairy Promotion Program is not part of any other statutory scheme. It is authorized by a separate statute unrelated in scope or purpose to the economic regulations such as the Agricultural Marketing Agreement Act, 7 U.S.C. §§601-611. The Dairy Promotion Program is not an amendment to the AMAA, but a separate provision entirely at 7 U.S.C. §§4901 *et seq*.

The Dairy Promotion Program is administered by a completely separate board. The Dairy Promotion Program is administered by the National Dairy Promotion and Research Board subject to the approval of the Secretary. The AMAA is administered at the market area level by a milk market administrator, a presidential appointee under the Secretary. The Dairy Board has no power to enforce or recommend changes to federal marketing orders, nor do those involved in the marketing orders have such power over the promotion order.

The Dairy Promotion Program has an independent purpose. Congress declared the policy of the AMAA to "establish and maintain ... orderly marketing conditions", protect the interest of the consumer, provide an orderly flow of supply, and to avoid disruption of the markets of such commodity. 7 U.S.C. §602. In contrast, the policy of the Dairy Promotion Act is "the establishment. . . of an orderly procedure for financing. . . and carrying out a coordinated *program of promotion*" 7 U.S.C. §4501 [emphasis added].

Changes in the policies of changing administrations can have more influence on the direction of the generic advertising than economic necessity. This compelled generic advertising is not the voice of any collective, but of the government. The government is in complete control. The underlying authority emanates from Congressional policy, it is put into place and, thereafter, controlled by the Secretary of Agriculture. The Secretary can start or stop the program in his wisdom.

The program provides no safeguards to insure that the speech is either viable or vital. Almost all controls that are present in other collective activities are missing. The board that oversees its operation is not subject to any election by the paying producers and is not responsible to those who fund the program. The board's existence depends upon continuation of the program. Though they themselves are producers, they are, in the final analysis, appointees of the Secretary, and subject to consent with the Program.

IV.

The Dairy Promotion Program does involve ideology or political speech. In order for a producer to change the program or the speech she must actively do so in the political arena utilizing political or ideological speech. This is through seeking a change in legislation or administrative policy or convincing sufficient numbers of other producers to vote a certain way in the federally sanctioned and supervised referendum election. In competition to this ideological speech is the generic advertising that promotes not only dairy products, but the promotion itself.

The Dairy Promotion Program assesses Petitioners alone over one million dollars a year. For some dairy farmers the assessment, which approximates one percent of their gross, can exceed their net income and represents, in the net, a tax rate that would rankle almost anyone. Thus, the decision to vote

one way or another in the referenda that occurred in this program (the initial and the 1993) implicated more economic impact to dairy farmers than the outcome of many traditional elections. In straight dollars it exceeds the amount at issue in the school tax levy in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). *See, also, Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976) ("As to the particular consumer's interest in the free flow of the commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate.").

Silence is as much speech as speech itself. *Wooley v. Maynard,* 430 U.S. 705, 714 (1977). The Court has held that being compelled to fund speech is no less intrusive than being restrained from speaking altogether. *Abood,* 431 U.S. at 234. That the speech at issue in this case is "commercial" in nature is not dispositive for the First Amendment provides some protection even to commercial speech. *Virginia Bd. of Pharmacy v. Virginia Concerned Consumers Council, Inc.*, 425 U.S. 748 (1976).

The Promotion Program influences further dairy policy. The promotional material not only reaches consumers, it reaches two other key groups--policy makers including Members of Congress and other dairy farmers who are called upon from time to time to vote in a referendum on the issue. It tells those individuals that the promotion program obviates the need for other policy initiatives.

A look at why such legislation is passed in the first place further supports the concept that it is intended to compel some to speak against their will. The argument is that promotion helps everyone and compulsion is needed to get rid of "free riders". A "free rider" is one who benefits from the economic efforts of others. The assumption is that such

activity is a benefit. The issue of "free riders" can be better phrased as this: Congress wants dairy producers to speak. Concerned about the content of the speech, the Congress appoints the Secretary to create and control its content and dissemination. Concerned that there are producers who disagree with Congress' speech requirement and who will not want to participate, it is made mandatory. Those who chose to voice their speech differently or not at all are "free riders".

The results of the Dairy Promotion Program have been less than successful. According to reports of the USDA, per capita consumption of virtually all dairy products except cheese, has declined during the same period. According to the USDA in its publication "Food Consumption, Prices and Expenditures, 1970-93", Statistical Bulletin Number 915, per capita consumption of beverage milk averaged 226.5 pounds in 1983. In 1993, after ten years of the Dairy Promotion Program, the average per capita consumption of beverage milk was 214.2 pounds, or a reduction of about five percent. Per capita consumption continues to decline.

This raises the even more fundamental question— Why should the Petitioners even be required to justify their dissent by finding something "wrong" with the speech and prove that it is "wrong" or otherwise inappropriate in order to stop their support? This inverts the very function of the First Amendment as a constraint on the government.

CONCLUSION

This case raises an important First Amendment question that has broad interest geographically— it represents a national program. It also concerns a large number of programs now in existence or contemplated. The breadth of the rationale in the courts below promises further compelled speech in other industries.

The courts below need clarification of this Court's holding in *Wileman Bros. & Elliott* in the area of compelled speech outside of broader collective activities or regulations that otherwise restrain the individual activities of those compelled to fund the speech.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and Order of the United States Court of Appeals for the Sixth Circuit to consider the question of whether a stand alone program for compelled funding of generic advertising is subject to First Amendment analysis.

Dated: September 9, 1999

Respectfully submitted,

/s/_____
YALE & ASSOCIATES, CO., L.P.A.
*BENJAMIN F. YALE #0024730
KRISTINE H. REED #0066668
102 West Wapakoneta Street
P.O. Box 100
Waynesfield, Ohio 45896
(419) 568-5751
Attorneys for Petitioners

*Counsel of Record

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 98-1073

[Filed: March 2, 1999]

On Appeal from the
Western District of Michigan.

NATURE'S DAIRY, et al.,
Appellants,

v.

DAN GLICKMAN, AS SECRETARY OF AGRICULTURE, UNITED STATES DEPARTMENT OF AGRICULTURE, AND NATIONAL DAIRY PROMOTION BOARD,
Appellees.

Before NELSON and DAUGHTREY, Circuit Judges; SARGUS [FN*], District Judge.

FN* The Honorable Edmund A. Sargus, Jr., United States District Judge for the Southern District of Ohio, sitting by designation.

OPINION

SARGUS, District Judge.

Appellants, Nature's Dairy and other Michigan dairy producers (hereinafter collectively referred to as "Nature's Dairy"), brought this action in the district court seeking a declaration that the Dairy Production Stabilization Act of 1983,7 U.S.C. § 4501 et seq., violated their First Amendment rights and was therefore unconstitutional. The district court granted summary judgment in favor of the defendants-cross appellees. Appellants appeal from the decision of the district court granting summary judgment. Appellees cross appeal from the decision of the district court finding that the constitutional claims raised by the appellants should have been dismissed for failure to exhaust administrative remedies.

I.

Provisions of the Dairy Production Stabilization Act of 1983 ("Dairy Act") require dairy producers to make payments to the National Dairy Promotion and Research Board ("National Board") to fund, inter alia, certain national advertising campaigns. [FN1] The appellants claim these provisions violate their freedom of speech under the First Amendment. As dairy producers, the appellants are compelled under the Dairy Act to pay to the National Board the sum of 15 cents per hundredweight of milk for the advertising of dairy products and the funding of research projects. This amount may be reduced by up to 10 cents per hundredweight for payments made to a qualified state dairy program.7 U.S.C. § 4504(g).

FN1. Among the funded generic advertising programs is the popular "Got Milk?" campaign.

The Dairy Act, and the implementing regulations, establishes a National Board whose thirty-six members are directed to develop promotional campaigns to increase the use of milk and dairy products. 7 C.F.R. § 1150.131. The Board is prohibited

from using any of its funds to "influence governmental policy or action." 7 U.S.C. § 4504(j). At any time, if ten percent of producers request termination of a promotion order, the Secretary of Agriculture ("Secretary") is required to conduct a referendum.7 U.S.C. § 4507(b). In 1985 and 1993, a majority of producers voted to maintain the promotion order. (R. 32 Defs' Motion to Dismiss, Ex. 2).

The appellees contended in the district court that Nature's Dairy was required to exhaust the administrative remedies set forth in the Dairy Act. The Act provides:

(a) Any person subject to any order issued under this subchapter may file with the Secretary a petition stating that any such order or any provision of such order or any obligation imposed in connection therewith is not in accordance with law and requesting a modification thereof or an exemption therefrom. The petitioner shall thereupon be given an opportunity for a hearing on the petition, in accordance with regulations issued by the Secretary. After such hearing, the Secretary shall make a ruling on the petition, which shall be final if in accordance with law.

(b) The district courts of the United States in any district in which such person is an inhabitant or carries on business are hereby vested with jurisdiction to review such ruling, if a complaint for that purpose is filed within twenty days from the date of the entry of such ruling....

7 U.S.C. § 4509. The district court concluded that it had jurisdiction to hear the issues raised by Nature's Dairy, finding that a direct, First Amendment challenge to a statute may be brought without prior resort to administrative remedies.

The district court then considered the challenge raised by the appellants and determined that, under the holding in Glickman v. Wileman Brothers & Elliott, Inc., 521 U.S. 457 (1997), the advertising provisions of the Dairy Act were constitutional.

II.

This Court will first address the cross-appeal of the appellees which challenge the exercise of jurisdiction by the district court. Under7 U.S.C. § 4509(a), any person subject to an order of the Secretary, including payment into the National Board, may file a petition alleging that the order is not in accordance with law. The Secretary is required to hold a hearing and rule upon the issues raised in the petition. Additional review of the Secretary's decision may then be sought in the district court.7 U.S.C. § 4509(b). It is undisputed that National Dairy did not seek review by the Secretary.

The district court found that the appellants, by challenging the constitutionality of the statutory scheme itself, were not required to exhaust their administrative remedies. The district court distinguished Saulsbury Orchards and Almond Processing, Inc. v. Yeutter, 917 F.2d 1180 (9th Cir.1990), in which a constitutional challenge to a particular marketing order was raised. Because the appellants herein raised a First Amendment challenge to any order under the Dairy Promotion Program, the district court concluded it had jurisdiction under the Declaratory Judgment Act,28 U.S.C. § 2201.

Since the decision of the district court, the Ninth Circuit has decided the case of Gallo Cattle Co. v. U.S. Department of Agriculture, 159 F.3d 1194 (9th Cir.1998). Gallo Cattle Company ("Gallo") initially challenged before the Secretary the assessment it was ordered to pay into the Dairy Promotion Program. Gallo also sought interim relief by requesting that its payments be made to an escrow account pending final resolution. After the relief was denied, Gallo thereupon filed a complaint in district court seeking review of the interim order denying its request to escrow the payments.

The Ninth Circuit correctly interpreted 7 U.S.C. § 4509(b) as providing jurisdiction in the district court to review final orders of the Secretary. Since the Secretary's order denying Gallo's request that its payments be made to an escrow account had not

reached the merits of the petition, the Gallo decision concluded that the district court was without jurisdiction.

In Gallo Cattle Co., supra, the review sought in the district court concerned the denial of interim relief in a pending administrative case before the Secretary. In contrast, Nature's Dairy challenges the constitutionality of the entire statute, rather than a particular order. The district court correctly determined that the appellants were not required to exhaust their administrative remedies before seeking a declaration from the district court that the advertising provisions of the Dairy Act are unconstitutional.

III.

In determining that the advertising provisions of the Dairy Act were constitutional, the district court relied upon the decision of the Supreme Court in Glickman v. Wileman Brothers & Elliott, Inc., supra. In Glickman, a number of growers, handlers and processors of California tree fruits challenged provisions of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601, et seq. Under the Act, producers establish marketing orders and prices, together with limitations on both the quality and quantity of the marketed commodities. At issue in Glickman was a provision of a marketing order requiring payment of monies to fund marketing promotion and advertising. Wileman and others challenged the advertising order as violating the First Amendment. The Supreme Court held:

The legal question that we address is whether being compelled to fund this advertising raises a First Amendment issue for us to resolve, or rather is simply a question of economic policy for Congress and the Executive to resolve.

In answering that question we stress the importance of the statutory context in which it arises. California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity

that characterize other portions of the economy in which competition is fully protected by the antitrust laws. The business entities that are compelled to fund the generic advertising at issue in this litigation do so as a part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme. It is in this context that we consider whether we should review the assessments used to fund collective advertising, together with other collective activities, under the standard appropriate for the review of economic regulation or under a heightened standard appropriate for the review of First Amendment issues.

Three characteristics of the regulatory scheme at issue distinguish it from laws that we have found to abridge the freedom of speech protected by the First Amendment. First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views. Indeed, since all of the respondents are engaged in the business of marketing California nectarines, plums, and peaches, it is fair to presume that they agree with the central message of the speech that is generated by the generic program. Thus, none of our First Amendment jurisprudence provides any support for the suggestion that the promotional regulations should be scrutinized under a different standard than that applicable to the other anticompetitive features of the marketing orders.

Glickman, 117 S.Ct. at 2138 (footnotes omitted.)

Nature's Dairy urges this Court to distinguish Glickman from the provisions of the Dairy Act on the basis that the challenged provisions create a stand-alone program. In contrast, Glickman involved a provision of a comprehensive marketing order of which the advertising portion was but one part. Further, appellants seek to distinguish other instances of what they describe as permissible "compelled speech" when a collective

body, such as a union or an industry subject to collective production or marketing orders, needs to speak with a collective voice.

The district court rejected this distinction and found that the Dairy Promotion Program, similar to the program in Glickman, is part and parcel of a legitimate regulatory scheme for promotion of commodities. While the milk industry may not be as regulated as the produce industry at issue in Glickman, the Secretary correctly notes that federal regulation has permeated the dairy industry for more than fifty years. For decades, the federal government has operated a dairy price support program which was so successful that by the 1980's milk production outpaced demand, requiring the government to buy increasingly larger quantities of dairy products. Sen. Rep. No. 98--163, p. 14-15, Senate Committee on Agriculture. The advertising campaign funded by the Dairy Act is designed to stimulate consumer demand for a highly regulated product.

After rejecting any constitutionally significant distinction between the California fruit program and the milk industry, the district court applied the analysis used in Glickman to the Dairy Act. The court noted that the Act does not impose any restraint upon a producer from communicating any message to any audience. No producer is required to engage in actual or symbolic speech. The advertising at issue promotes only the consumption of dairy products and does not identify individual financial sponsors. Finally, the advertising program does not compel any producer to endorse or fund any political or ideological view.

The Supreme Court concluded its opinion in Glickman with the following thoughtful observation:

On occasion it is appropriate to emphasize the difference between policy judgments and constitutional adjudication....

Doubts concerning the policy judgments that underlie many features of this legislation do not, however, justify reliance on the First Amendment as a basis for reviewing economic regulations. Appropriate respect for the power of Congress to regulate commerce among the States provides abundant support for the constitutionality of these marketing orders on the following reasoning.
Glickman at 2141 (footnote omitted).

While appellants vigorously object to the mandatory provisions of the Dairy Act, in the absence of constitutional infirmity, this Court must defer to the judgment of Congress.

The decision of the district court is AFFIRMED in all respects.
C.A.6 (Mich.),1999.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. 1:96-CV-499

[Filed: January 6, 1998]

NATURE'S DAIRY, et al.,
Plaintiffs,

v.

DAN GLICKMAN SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, et al.,
Defendants.

Before: Hon. Robert Holmes Bell

OPINION

Through this action dairy producers seek an order declaring that the Dairy Promotion Act and its implementing regulations violate the First Amendment. The matter is currently before the Court on cross-motions for summary judgment.

I.

Plaintiffs are dairy producers who challenge the constitutionality of the Dairy Production Stabilization Act

("Dairy Act"), 7 U.S.C. § 4501 et seq.[1] The Dairy Act provides for the issuance of promotion orders requiring dairy producers to contribute assessments in the amount of 15 cents per hundredweight of milk for advertising of dairy products, research projects, and nutrition education. 7 U.S.C. § 4504. In enacting the Dairy Act, Congress determined "that it is in the public interest to authorize the establishment . . . of an orderly procedure for financing... and carrying out a coordinated program of promotion designed to strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products produced in the United States." 7 U.S.C. § 4501 (b).

Plaintiff milk producers do not object to any particular content or message contained in the Dairy Promotion Orders. Rather, they claim that being required to contribute funds to the advertising program violates their first Amendment Rights.

This matter is now before the Court on the parties' cross-motions for summary judgment.

II.

As a preliminary matter, Defendants have requested this Court to reconsider its prior determination that it has jurisdiction over Plaintiff's second amended complaint. Defendants contend that this Court lacks jurisdiction over this matter because Plaintiffs have failed to exhaust their administrative remedies.

This Court previously determined that Plaintiffs' second amended complaint was not subject to the administrative

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[1] Plaintiffs' original and first amended complaint sought an injunction against enforcement of the Dairy Promotion Order promulgated by the Secretary of Agriculture. The amended complaint was dismissed for lack of jurisdiction because Plaintiffs failed to exhaust their administrative remedies. Plaintiffs were granted leave to file a second amended complaint which challenged the constitutionality of the Dairy Act itself.

exhaustion requirement because a direct first amendment challenge to a statute can be brought without any prior resort to administrative remedies. Defendants have not convinced this Court that its original analysis on this issue was in error. Accordingly, this Court will deny Defendants' motion to reconsider and to dismiss for lack of jurisdiction.

III.

The focus of the cross-motions for summary judgment is on the issue of whether the Dairy Production Stabilization Act unconstitutionally infringes on Plaintiffs' First Amendment rights.

Defendants contend that resolution of this issue is controlled by the recent Supreme Court decision in Glickman v. Wileman Brothers & Elliott, Inc., 138 L.Ed.2d 585, 117 S. Ct. 2130 (1997). The Supreme Court decided in Wileman that a marketing order promulgated under the Agricultural Marketing Agreement Act of 1937 ("AMAA"), 7 U.S.C. § 601 et seq., which compelled tree fruit handlers to contribute assessments for generic advertising was simply an economic regulation and did not violate the First Amendment. According to Defendants, Wileman requires a similar determination that the Dairy Act does not violate the First Amendment .

Plaintiffs contend that Wileman cannot be applied to the Dairy Act because the Dairy Act is a stand alone program. In Wileman the Court noted that the tree fruit business entities that were compelled to fund the generic advertising did so "as a part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme." 138 L.Ed.2d at 599. The marketing order discussed in Wileman not only established a generic advertising program but also set uniform prices, product standards, and other conditions for producers. The fruit tree advertising is paid from funds collected pursuant to marketing orders under the AMAA. 7 U.S.C. § 608c (6) (I). Plaintiffs argue that in contrast to the fruit tree advertising program discussed in Wileman, milk

promotion under the Dairy Act is not directly tied to any marketing orders or other economic regulations. The Dairy Act is not an amendment to the AMAA or any other statute. Because the Dairy Promotion Program is a stand alone program, Plaintiffs contend it should be tested under the Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980), test rather than under Wileman.

In Central Hudson, the Supreme Court held that a Public Service Commission regulation which completely banned promotional advertising by an electric utility violates the First Amendment. Wileman rejected application of the Central Hudson test to assessments for generic advertising because the Court determined that the assessments for generic advertising in the highly-regulated market was not speech protected by the First Amendment. The Court reasoned that while the First Amendment unquestionably protects the individual producer's right to advertise its own brands, the AMAA, which is designed to further the economic interests of the producers as a group, was a legitimate exercise of Congressional power and was consistent with the overall statutory scheme. Wileman, 138 L.Ed.2d at 603-04.[2] The Court held that compelled funding of the generic advertising program was simply a question of economic policy for Congress and the Executive to decide and did not raise a First Amendment issue.

There is nothing in the Wileman opinion that would indicate that it is inapplicable to a stand alone program such as the Dairy Program. Dairy products, like tree fruit, are subject to extensive governmental regulation. Prices received by dairy

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[2] The Central Hudson test was applied by the Ninth Circuit in Wileman, 58 F.3d 1367 (9th Cir. 1995), and in Cal-Almond, Inc. v. U.S. Dept. of Agriculture, 14 F.3d 429 (9th Cir. 1993). Wileman was reversed by the Supreme Court, 117 S.Ct. 2130 (1997), and Cal-Almond was vacated and remanded in light of Wileman, 117 S.Ct. 2501 (1997).

producers and paid by dairy handlers are regulated by the AMAA. Milk price supports are governed by the Federal Agriculture Improvement and Reform Act of 1996, 7 U.S.C. § 7251 et seq. A coordinated program of generic dairy promotion is governed by the Dairy Act. 7 U.S.C. § 4501 et seq.

Plaintiffs argue that the mandatory nature of the Dairy assessments for generic advertising violate the First Amendment because it restrains producers from communicating some messages to some audiences; it compels producers to engage in actual or symbolic speech; and it compels the producers to finance disagreeable political and ideological views.

Each of these arguments was rejected in Wileman. First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. 138 L.Ed.2d at 600. The Court rejected the argument that the assessments reduced the amount of money available to conduct their own advertising. Id. at 600. "The First Amendment has never been construed to require heightened scrutiny of any financial burden that has the incidental effect of constraining the size of a firm's advertising budget." Id.

Second, the mandatory assessments to fund generic advertising do not compel any person to engage in any actual or symbolic speech. 138 L.Ed.2d at 600. The Court reasoned that compelled speech case law is inapplicable to the regulatory scheme at issue because the use of assessments to pay for generic advertising of tree fruit does not require respondents to repeat an objectionable message out of their own mouths or require them to use their own property to convey an antagonistic ideological message, force them to respond to a hostile message, or require them to be publicly identified with another's message. Id. at 600-01.

Third, the marketing orders do not compel the producers to endorse or to finance any political or ideological views. 138 L.Ed.2d at 600. The Court noted that mandatory

funding of expressive activities does not always constitute compelled speech in violation of the First Amendment. Mandatory assessments to fund a lawful collective program may be used to pay for speech that is germane to the purpose for which compelled association was justified. Id. At 602. See e.g., Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991) (faculty union dues could be used for portions of union publication that concern teaching and education generally, professional development, unemployment, job opportunities, award programs, and other miscellaneous matters) ; Keller v. State Bar of Cal., 496 U.S. 1 (1990) (integrated state bar may constitutionally fund activities germane to goals of regulating legal profession and improving quality of legal services).

The Wileman Court reasoned that requiring the producers to pay the assessments does not engender any crisis of conscience.

Id. At 601.

> Neither the fact that respondents may prefer to foster that message independently in order to promote and distinguish their own products, nor the fact that they think more or less money should by spent fostering it, makes this case comparable to those in which an objection rested on political or ideological disagreement with the content of the message.

Id. at 601-02.

None of the arguments raised by Plaintiffs has any more validity in the milk context than in the fruit tree context. The Dairy Act was enacted for the purposes of strengthening the dairy industry's position in the marketplace and maintaining and expanding markets and uses for fluid milk and dairy products. 7 U.S.C. § 4501 (b). The advertising program is germane to these legitimate economic purposes. The Dairy Promotion Program, like the generic tree fruit promotional program addressed in Wileman, is tied to a legitimate regulatory scheme for research and promotion of commodities. Nothing in the Dairy Act either bars Plaintiffs from using their

own funds for advertising, or requires them to engage personally and directly in advertising. The Dairy Act does not restrict Plaintiffs' right to communicate any message, compel Plaintiffs to engage in speech, or compel them to endorse any political views with which they disagree. The Dairy Act clearly survives Plaintiffs' First Amendment challenge for the same reasons set forth in Wileman.

In Delano Farms Co. v. The California Table Grape Commission, CV-F-96-6053, slip op. (E.D. Cal. Sept. 11, 1997), the district court similarly rejected the argument that stand alone programs should not be bound by Wileman:

> Glickman [v. Wileman]'s holding is summarized in the first words of the principal dissent: "The Court today finds no First Amendment right to be free of coerced subsidization of commercial speech . . . ." That different result obtains when a program does not regulate fruit size, color, etc. is unconvincing. Were that the case, the state could validate a program merely by adding additional regulatory burdens. Nothing in Glickman indicates results should differ in "stand alone" advertising programs. "Generic advertising is intended to stimulate consumer demand for an agricultural product." Glickman at 7-8. Expansion of consumer demand is itself a "regulatory" objective and generic advertising is a rational means to fulfilling that objective.
>
> Although the differences between the tree fruit advertising discussed in Wileman and the Dairy Promotion orders are not insignificant, this Court is satisfied that the reasoning of Wileman applies to the Dairy Act and compels the conclusion that the Dairy Act does not violate Plaintiffs' First Amendment rights. Accordingly, Defendants' motion for summary judgment will be granted and Plaintiffs' motion for summary judgment will be denied.

An order and judgment consistent with this opinion shall be entered.

Date: January 6, 1998

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. 1:96-CV-499

[Filed: January 6, 1998]

NATURE'S DAIRY, et al.,
Plaintiffs,

v.

DAN GLICKMAN SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, et al.,
Defendants.

Before: Hon. Robert Holmes Bell

ORDER AND JUDGMENT

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED THAT Defendants' motion to dismiss or in the alternative, for summary judgment (Docket # 32) is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiffs' motion for summary judgment (Docket # 33) is **DENIED**.

IT IS FURTHER ORDERED that **JUDGMENT** is entered for Defendants and this case is **DISMISSED** in its entirety.

Date: January 6, 1998

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 98-1073

[Filed: June 11, 1999]

On Appeal from the
Western District of Michigan.

NATURE'S DAIRY, et al.,
Appellants,

v.

DAN GLICKMAN, AS SECRETARY OF AGRICULTURE, UNITED STATES DEPARTMENT OF AGRICULTURE, AND NATIONAL DAIRY PROMOTION BOARD,
Appellees.

BEFORE: NELSON and DAUGHTREY, Circuit Judges; and SARGES, *District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the

*Hon. Edmund A. Sargus, Jr., United States District Judge for the Southern District of Ohio, sitting by designation.

original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

APPENDIX E

UNITED STATES CODE ANNOTATED
TITLE 7. AGRICULTURE
CHAPTER 26--AGRICULTURAL ADJUSTMENT
SUBCHAPTER III--COMMODITY BENEFITS
Current through P.L. 104-98, approved 1-16-96

Sec. 608c. Orders regulating handling of commodity
***

(5) Milk and its products; terms and conditions of orders
***

(I) Establishing or providing for the establishment of research and development projects, and advertising (excluding brand advertising), sales promotion, educational, and other programs, designed to improve or promote the domestic marketing and consumption of milk and its products, to be financed by producers in a manner and at a rate specified in the order, on all producer milk under the order. Producer contributions under this subparagraph may be deducted from funds due producers in computing total pool value or otherwise computing total funds due producers and such deductions shall be in addition to the adjustments authorized by paragraph (B) of this subsection. Provision may be made in the order to exempt, or allow suitable adjustments or credits in connection with, milk on which a mandatory checkoff for advertising or marketing research is required under the authority of any State law. Such funds shall be paid to an agency organized by milk producers and producers' cooperative associations in such form and with such methods of operation as shall be specified in the order. Such agency may expend such funds for any of the purposes authorized by this subparagraph and may designate, employ,

and allocate funds to persons and organizations engaged in such programs which meet the standards and qualifications specified in the order. All funds collected under this subparagraph shall be separately accounted for and shall be used only for the purposes for which they were collected. Programs authorized by this subparagraph may be either local or national in scope, or both, as provided in the order, but shall not be international. Order provisions under this subparagraph shall not become effective in any marketing order unless such provisions are approved by producers separately from other order provisions, in the same manner provided for the approval of marketing orders, and may be terminated separately whenever the Secretary makes a determination with respect to such provisions as is provided for the termination of an order in subsection (16)(B) of this section. Disapproval or termination of such order provisions shall not be considered disapproval of the order or of other terms of the order. Notwithstanding any other provision of this chapter, any producer against whose marketings any assessment is withheld or collected under the authority of this subparagraph, and who is not in favor of supporting the research and promotion programs, as provided for herein, shall have the right to demand and receive a refund of such assessment pursuant to the terms and conditions specified in the order.

(6) Other commodities; terms and conditions of orders

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to

any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative, or upon the current quantities available for sale by such producers, or both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing

for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing or providing for the establishment of reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

(F) Requiring or providing for the requirement of inspection of any such commodity or product produced during specified periods and marketed by handlers.

(G) In the case of hops and their products, in addition to, or in lieu of, the foregoing terms and conditions, orders may contain one or more of the following:

(i) Limiting, or providing methods for the limitation of, the total quantity thereof, or of any grade, type, or variety thereof, produced during any specified period or periods, which all handlers may handle in the current of or so as directly to burden, obstruct, or affect interstate or foreign commerce in hops or any product thereof.

(ii) Apportioning, or providing methods for apportioning, the total quantity of hops of the production of the then current calendar year permitted to be handled equitably among all producers in the production area to which the order applies upon the basis of one or more or a combination of the following: The total quantity of hops available or estimated will become available for market by each producer from his production during such period; the normal production of the acreage of hops operated by each producer during such period upon the basis of the number of acres of hops in production, and the average yield of that acreage during such period as the Secretary determines to be representative, with adjustments determined by the Secretary to be proper for age of plantings or abnormal conditions affecting yield; such normal production or historical record of any acreage for which data as to yield of hops are not available or which had no yield during such period

shall be determined by the Secretary on the basis of the yields of other acreage of hops of similar characteristics as to productivity, subject to adjustment as just provided for.

(iii) Allotting, or providing methods for allotting, the quantity of hops which any handler may handle so that the allotment fixed for that handler shall be limited to the quantity of hops apportioned under preceding clause (ii) to each respective producer of hops; such allotment shall constitute an allotment fixed for that handler within the meaning of subsection (5) of section 608a of this title.

(H) Providing a method for fixing the size, capacity, weight, dimensions, or pack of the container, or containers, which may be used in the packaging, transportation, sale, shipment, or handling of any fresh or dried fruits, vegetables, or tree nuts: Provided, however, That no action taken hereunder shall conflict with the Standard Containers Act of 1916 and the Standard Containers Act of 1928;

(I) Establishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order: Provided, That with respect to orders applicable to almonds, filberts (otherwise known as hazelnuts), California-grown peaches, cherries, papayas, carrots, citrus fruits, onions, Tokay grapes, pears, dates, plums, nectarines, celery, sweet corn, limes, olives, pecans, eggs, avocadoes, apples, raisins, walnuts, tomatoes, or Florida grown strawberries, such projects may provide for any form of marketing promotion including paid advertising and with respect to almonds, filberts (otherwise known as hazelnuts), raisins, walnuts, olives, and Florida Indian River grapefruit may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order

and when the handling of any commodity for canning or freezing is regulated, then any such projects may also deal with the commodity or its products in canned or frozen form: Provided further, That the inclusion in a Federal marketing order of provisions for research and marketing promotion, including paid advertising, shall not be deemed to preclude, preempt or supersede any such provisions in any State program covering the same commodity.

(J) In the case of pears for canning or freezing, any order for a production area encompassing territory within two or more States or portions thereof shall provide that the grade, size, quality, maturity, and inspection regulation under the order applicable to pears grown within any such State or portion thereof may be recommended to the Secretary by the agency established to administer the order only if a majority of the representatives from that State on such agency concur in the recommendation each year.

APPENDIX F

UNITED STATES CODE ANNOTATED
TITLE 7. AGRICULTURE
CHAPTER 76--DAIRY RESEARCH AND PROMOTION
SUBCHAPTER I--DAIRY PROMOTION PROGRAM

Current through P.L. 105-4, approved 3-3-97

§ 4501. Congressional findings and declaration of policy

(a) Congress finds that--

(1) dairy products are basic foods that are a valuable part of the human diet;

(2) the production of dairy products plays a significant role in the Nation's economy, the milk from which dairy products are manufactured is produced by thousands of milk producers, and dairy products are consumed by millions of people throughout the United States;

(3) dairy products must be readily available and marketed efficiently to ensure that the people of the United States receive adequate nourishment;

(4) the maintenance and expansion of existing markets for dairy products are vital to the welfare of milk producers and those concerned with marketing, using, and producing dairy products, as well as to the general economy of the Nation; and

(5) dairy products move in interstate and foreign commerce, and dairy products that do not move in such channels of commerce directly burden or affect interstate commerce of dairy products.

(b) It, therefore, is declared to be the policy of Congress that it is in the public interest to authorize the establishment, through the exercise of the powers provided herein, of an orderly procedure for financing (through assessments on all

milk produced in the United States for commercial use) and carrying out a coordinated program of promotion designed to strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products produced in the United States. Nothing in this subchapter may be construed to provide for the control of production or otherwise limit the right of individual milk producers to produce milk.

§ 4502. Definitions

As used in this subchapter--

(a) the term "Board" means the National Dairy Promotion and Research Board established under section 4504 of this title;

(b) the term "Department" means the Department of Agriculture;

(c) the term "Secretary" means the Secretary of Agriculture;

(d) the term "milk" means any class of cow's milk produced in the United States;

(e) the term "dairy products" means products manufactured for human consumption which are derived from the processing of milk, and includes fluid milk products;

(f) the term "fluid milk products" means those milk products normally consumed in liquid form as a beverage;

(g) the term "person" means any individual, group of individuals, partnership, corporation, association, cooperative, or any other entity;

(h) the term "producer" means any person engaged in the production of milk for commercial use;

(i) the term "promotion" means actions such as paid advertising, sales promotion, and publicity to advance the image and sales of and demand for dairy products;

(j) the term "research" means studies testing the effectiveness of market development and promotion efforts, studies relating to the nutritional value of milk and dairy products, and other related efforts to expand demand for milk

and dairy products;

(k) the term "nutrition education" means those activities intended to broaden the understanding of sound nutritional principles including the role of milk and dairy products in a balanced diet; and

(l) the term "United States" as used in sections 4501 through 4508 of this title means the forty-eight contiguous States in the continental United States.

§ 4503. Issuance of orders

(a) Notice and opportunity for public comment

During the period beginning with November 29, 1983, and ending thirty days after receipt of a proposal for an initial dairy products promotion and research order, the Secretary shall publish such proposed order and give due notice and opportunity for public comment upon the proposed order. The proposal for an order may be submitted by an organization certified under section 4505 of this title or by any interested person affected by the provisions of this subchapter.

(b) Effective date of orders

After notice and opportunity for public comment are given, as provided for in subsection (a) of this section, the Secretary shall issue a dairy products promotion and research order. Such order shall become effective not later than ninety days following publication of the proposal.

(c) Amendment of orders

The Secretary may, from time to time, amend a dairy products promotion and research order.

§ 4504. Required terms in orders

Any order issued under this subchapter shall contain terms and conditions as follows:

(a) The order shall provide for the establishment and administration of appropriate plans or projects for advertisement and promotion of the sale and consumption of dairy products, for research projects related thereto, for

nutrition education projects, and for the disbursement of necessary funds for such purposes. Any such plan or project shall be directed toward the sale and marketing or use of dairy products to the end that the marketing and use of dairy products may be encouraged, expanded, improved, or made more acceptable. No such advertising or sales promotion program shall make use of unfair or deceptive acts or practices with respect to the quality, value, or use of any competing product.

(b) The order shall provide for the establishment and appointment by the Secretary of a National Dairy Promotion and Research Board that shall consist of not less than thirty-six members. Members of the Board shall be milk producers appointed by the Secretary from nominations submitted by eligible organizations certified under section 4505 of this title, or, if the Secretary determines that a substantial number of milk producers are not members of, or their interests are not represented by, any such eligible organization, then from nominations made by such milk producers in the manner authorized by the Secretary. In making such appointments, the Secretary shall take into account, to the extent practicable, the geographical distribution of milk production volume throughout the United States. In determining geographic representation, whole States shall be considered as a unit. A region may be represented by more than one director and a region may be made up of more than one State. The term of appointment to the Board shall be for three years with no member serving more than two consecutive terms, except that initial appointments shall be proportionately for one-year, two-year, and three-year terms. The Board shall appoint from its members an executive committee whose membership shall equally reflect each of the different regions in the United States in which milk is produced. The executive committee shall have such duties and powers as are conferred upon it by the Board. Board members shall serve without compensation, but shall be reimbursed for their reasonable expenses incurred in performing their duties as members of the Board including a

per diem allowance as recommended by the Board and approved by the Secretary.

(c) The order shall define the powers and duties of the Board that shall include only the powers enumerated in this section. These shall include, in addition to the powers set forth elsewhere in this section, the powers to (1) receive and evaluate, or on its own initiative develop, and budget for plans or projects to promote the use of fluid milk and dairy products as well as projects for research and nutrition education and to make recommendations to the Secretary regarding such proposals, (2) administer the order in accordance with its terms and provisions, (3) make rules and regulations to effectuate the terms and provisions of the order, (4) receive, investigate, and report to the Secretary complaints of violations of the order, and (5) recommend to the Secretary amendments to the order. The Board shall solicit, among others, research proposals that would increase the use of fluid milk and dairy products by the military and by persons in developing nations, and that would demonstrate the feasibility of converting surplus nonfat drymilk to casein for domestic and export use.

(d) The order shall provide that the Board shall develop and submit to the Secretary for approval any promotion, research, or nutrition education plan or project and that any such plan or project must be approved by the Secretary before becoming effective.

(e) The order shall require the Board to submit to the Secretary for approval budgets on a fiscal period basis of its anticipated expenses and disbursements in the administration of the order, including projected costs of dairy products promotion and research projects. For each of fiscal years 1997 through 2001, the Board's budget may provide for the expenditure of revenues available to the Board to develop international markets for, and to promote within such markets,

the consumption of dairy products produced in the United States from milk produced in the United States.

(f) The order shall provide that the Board, with the approval of the Secretary, may enter into agreements for the development and conduct of the activities authorized under the order as specified in subsection (a) of this section and for the payment of the cost thereof with funds collected through assessments under the order. Any such agreement shall provide that (1) the contracting party shall develop and submit to the Board a plan or project together with a budget or budgets that shall show estimated costs to be incurred for such plan or project, (2) the plan or project shall become effective upon the approval of the Secretary, and (3) the contracting party shall keep accurate records of all of its transactions, account for funds received and expended, and make periodic reports to the Board of activities conducted, and such other reports as the Secretary or the Board may require.

(g) The order shall provide that each person making payment to a producer for milk produced in the United States and purchased from the producer shall, in the manner as prescribed by the order, collect an assessment based upon the number of hundredweights of milk for commercial use handled for the account of the producer and remit the assessment to the Board. The assessment shall be used for payment of the expenses in administering the order, with provision for a reasonable reserve, and shall include those administrative costs incurred by the Department after an order has been promulgated under this subchapter. The rate of assessment prescribed by the order shall be 15 cents per hundredweight of milk for commercial use or the equivalent thereof. A milk producer or the producer's cooperative who can establish that the producer is participating in active, ongoing qualified State or regional dairy product promotion or nutrition education programs intended to increase consumption of milk and dairy products generally shall receive credit in determining the assessment due from such producer for contributions to such

programs of up to 10 cents per hundredweight of milk marketed or, for the period ending six months after November 29, 1983, up to the aggregate rate in effect on November 29, 1983 of such contributions to such programs (but not to exceed 15 cents per hundredweight of milk marketed) if such aggregate rate exceeds 10 cents per hundredweight of milk marketed. Any person marketing milk of that person's own production directly to consumers shall remit the assessment directly to the Board in the manner prescribed by the order.

(h) The order shall require the Board to (1) maintain such books and records (which shall be available to the Secretary for inspection and audit) as the Secretary may prescribe, (2) prepare and submit to the Secretary, from time to time, such reports as the Secretary may prescribe, and (3) account for the receipt and disbursement of all funds entrusted to it.

(i) The order shall provide that the Board, with the approval of the Secretary, may invest, pending disbursement under a plan or project, funds collected through assessments authorized under this subchapter, only in obligations of the United States or any agency thereof, in general obligations of any State or any political subdivision thereof, in any interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System, or in obligations fully guaranteed as to principal and interest by the United States.

(j) The order shall prohibit any funds collected by the Board under the order from being used in any manner for the purpose of influencing governmental policy or action except as provided by subsection (c)(5) of this section.

(k) The order shall require that each person receiving milk from farmers for commercial use, and any person marketing milk of that person's own production directly to consumers, maintain and make available for inspection such books and records as may be required by the order and file reports at the time, in the manner, and having the content prescribed by the order. Such information shall be made available to the

Secretary as is appropriate to the administration or enforcement of this subchapter, or any order or regulation issued under this subchapter. All information so obtained shall be kept confidential by all officers and employees of the Department, and only such information so obtained as the Secretary deems relevant may be disclosed by them and then only in a suit or administrative hearing brought at the request of the Secretary, or to which the Secretary or any officer of the United States is a party, and involving the order with reference to which the information to be disclosed was obtained. Nothing in this subsection may be deemed to prohibit (1) the issuance of general statements, based upon the reports, of the number of persons subject to an order or statistical data collected therefrom, which statements do not identify the information furnished by any person, or (2) the publication, by direction of the Secretary, of the name of any person violating any order, together with a statement of the particular provisions of the order violated by such person. No information obtained under the authority of this chapter may be made available to any agency or officer of the Federal Government for any purpose other than the implementation of this chapter and any investigatory or enforcement action necessary for the implementation of this chapter. Any person violating the provisions of this subsection shall, upon conviction, be subject to a fine of not more than $1,000, or to imprisonment for not more than one year, or both, and, if an officer or employee of the Board or the Department, shall be removed from office.

(l) The order shall provide terms and conditions, not inconsistent with the provisions of this subchapter, as necessary to effectuate the provisions of the order.

§ 4505. Certification of organizations

(a) The eligibility of any organization to represent milk producers, and to participate in the making of nominations under section 4504 of this title shall be certified by the Secretary. The Secretary shall certify any organization that the

Secretary determines meets the eligibility criteria established by the Secretary under this section and the Secretary's determination as to eligibility shall be final.

(b) Certification shall be based, in addition to other available information, on a factual report submitted by the organization, which shall contain information deemed relevant and specified by the Secretary, including, but not limited to, the following:

(1) geographic territory covered by the organization's active membership;

(2) nature and size of the organization's active membership including the proportion of the total number of active milk producers represented by the organization;

(3) evidence of stability and permanency of the organization;

(4) sources from which the organization's operating funds are derived;

(5) functions of the organization; and

(6) the organization's ability and willingness to further the aims and objectives of this subchapter.

The primary considerations in determining the eligibility of an organization shall be whether its membership consists primarily of milk producers who produce a substantial volume of milk and whether the primary or overriding interest of the organization is in the production or processing of fluid milk and dairy products and promotion of the nutritional attributes of fluid milk and dairy products.

§ 4506. Requirement of referendum

(a) Within the sixty-day period immediately preceding September 30, 1985, the Secretary shall conduct a referendum among producers who, during a representative period (as determined by the Secretary), have been engaged in the production of milk for commercial use for the purpose of ascertaining whether the order then in effect shall be continued.

Such order shall be continued only if the Secretary determines that it has been approved by not less than a majority of the producers voting in the referendum, who during a representative period (as determined by the Secretary) have been engaged in the production of milk for commercial use. If continuation of the order is not approved by a majority of the producers voting in the referendum, the Secretary shall terminate collection of assessments under the order within six months after the Secretary determines that such action is favored by a majority of the producers voting in the referendum and shall terminate the order in an orderly manner as soon as practicable after such determination.

(b) The Secretary shall be reimbursed from assessments collected by the Board for any expenses incurred by the Department in connection with the conduct of any referendum under this section and section 4507 of this title, except for the salaries of Government employees.

§ 4507. Suspension and termination of orders

(a) Determination by Secretary

After September 30, 1985, the Secretary shall, whenever the Secretary finds that any order issued under this subchapter or any provision thereof obstructs or does not tend to effectuate the declared policy of this subchapter, terminate or suspend the operation of such order or such provisions thereof.

(b) Referendum

After September 30, 1985, the Secretary may conduct a referendum at any time, and shall hold a referendum on request of a representative group comprising 10 per centum or more of the number of producers subject to the order, to determine whether the producers favor the termination or suspension of the order. The Secretary shall suspend or terminate collection of assessments under the order within six months after the Secretary determines that suspension or termination of the order is favored by a majority of the producers voting in the referendum who, during a representative period (as determined

by the Secretary), have been engaged in the production of milk for commercial use and shall terminate the order in an orderly manner as soon as practicable after such determination.

(c) Action not considered an order

The termination or suspension of any order, or any provision thereof, shall not be considered an order within the meaning of this subchapter.

§ 4508. Cooperative association representation

Whenever, under the provisions of this subchapter, the Secretary is required to determine the approval or disapproval of producers, the Secretary shall consider the approval or disapproval by any cooperative association of producers, engaged in a bona fide manner in marketing milk or the products thereof, as the approval or disapproval of the producers who are members of or under contract with such cooperative association of producers. If a cooperative association of producers elects to vote on behalf of its members, such cooperative association shall provide each producer, on whose behalf the cooperative association is expressing approval or disapproval, a description of the question presented in the referendum together with a statement of the manner in which the cooperative association intends to cast its vote on behalf of the membership. Such information shall inform the producer of procedures to follow to cast an individual ballot should the producer so choose within the period of time established by the Secretary for casting ballots. Such notification shall be made at least thirty days prior to the referendum and shall include an official ballot. The ballots shall be tabulated by the Secretary and the vote of the cooperative association shall be adjusted to reflect such individual votes.

§ 4509. Petition and review

(a) Any person subject to any order issued under this

subchapter may file with the Secretary a petition stating that any such order or any provision of such order or any obligation imposed in connection therewith is not in accordance with law and requesting a modification thereof or an exemption therefrom. The petitioner shall thereupon be given an opportunity for a hearing on the petition, in accordance with regulations issued by the Secretary. After such hearing, the Secretary shall make a ruling on the petition, which shall be final if in accordance with law.

(b) The district courts of the United States in any district in which such person is an inhabitant or carries on business are hereby vested with jurisdiction to review such ruling, if a complaint for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had on the Secretary by delivering a copy of the complaint to the Secretary. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires.

§ 4510. Enforcement

(a) Restraining order; civil action; minor violation

The district courts of the United States are vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating, any order or regulation made or issued under this subchapter. Any civil action authorized to be brought under this subsection shall be referred to the Attorney General for appropriate action, except that the Secretary is not required to refer to the Attorney General minor violations of this subchapter whenever the Secretary believes that the administration and enforcement of this subchapter would be adequately served by suitable written notice or warning to any person committing such violation.

(b) Civil penalties

Any person who willfully violates any provision of any order issued by the Secretary under this chapter shall be assessed a civil penalty by the Secretary of not more than $1,000 for each such violation and, in the case of a willful failure to pay, collect, or remit the assessment as required by the order, in addition to the amount due, a penalty equal to the amount of the assessment on the quantity of milk as to which the failure applies. The amount of any such penalty shall accrue to the United States and may be recovered in a civil suit brought by the United States.

(c) Availability of other remedies

The remedies provided in subsections (a) and (b) of this section shall be in addition to, and not exclusive of, other remedies that may be available.

§ 4511. Investigations; power to subpeona and take oaths and affirmations; aid of courts

The Secretary may make such investigations as the Secretary deems necessary for the effective administration of this subchapter or to determine whether any person subject to the provisions of this subchapter has engaged or is about to engage in any act that constitutes or will constitute a violation of any provision of this subchapter or of any order, or rule or regulation issued under this subchapter. For the purpose of such investigation, the Secretary may administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any records that are relevant to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States. In case of contumacy by, or refusal to obey a subpoena to, any person, the Secretary may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of records. The court may issue an order requiring such person to

appear before the Secretary to produce records or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof. Process in any such case may be served in the judicial district in which such person is an inhabitant or wherever such person may be found.

§ 4512. Administrative provisions

(a) Nothing in this subchapter may be construed to preempt or supersede any other program relating to dairy product promotion organized and operated under the laws of the United States or any State.

(b) The provisions of this subchapter applicable to orders shall be applicable to amendments to orders.

§ 4513. Authorization of appropriations

There are hereby authorized to be appropriated such funds as are necessary to carry out the provisions of this subchapter. The funds so appropriated shall not be available for payment of the expenses or expenditures of the Board in administering any provisions of any order issued under the terms of this subchapter.

§ 4514. Dairy reports

The Secretary of Agriculture shall submit to the House Committee on Agriculture and the Senate Committee on Agriculture, Nutrition, and Forestry the following reports:

(1) Not later than July 1, 1984, a report on the effect of applying, nationally, standards similar to the current California standards for fluid milk products in their final consumer form, as they would relate to--

(A) consumer acceptance, overall consumer consumption trends, and total per capita consumption;

(B) nutritional augmentation, particularly for young and older Americans;

(C) implementing improved interagency enforcement of

minimum standards to prevent consumer fraud and deception;

(D) multiple component pricing for producer milk;

(E) reduced Commodity Credit Corporation purchases;

(F) consistency of product quality throughout the year and between marketing regions of the United States; and

(G) consumer prices.

(2) Not later than December 31, 1984, a report on (A) recommendations for changes in the application of the parity formula to milk so as to make the formula more consistent with modern production methods and with special attention to the cost of producing milk as a result of changes in productivity, and (B) the feasibility of imposing a limitation on the total amount of payments and other assistance a producer of milk may receive during a year under section 1446(d) of this title.

(3) Not later than April 15, 1985, a report on the effectiveness of the paid diversion program carried out under section 1446(d) of this title.

(4) Not later than July 1, 1985, and July 1 of each year after the date of enactment of this title, [FN1] an annual report describing activities conducted under the dairy products promotion and research order issued under this subchapter, and accounting for the receipt and disbursement of all funds received by the National Dairy Promotion and Research Board under such order including an independent analysis of the effectiveness of the program.

§ 4531. Definitions

For purposes of this subchapter--

(1) the term "board" means the board of trustees of the Institute;

(2) the term "Department" means the Department of Agriculture;

(3) the term "dairy products" means manufactured products that are derived from the processing of milk, and includes fluid milk products;

(4) the term "fluid milk products" means those milk

products normally consumed in liquid form as a beverage;

(5) the term "Fund" means the Dairy Research Trust Fund established by section 4536 of this title;

(6) the term "Institute" means the National Dairy Research Endowment Institute established by section 4532 of this title;

(7) the term "milk" means any class of cow's milk marketed in the United States;

(8) the term "person" means any individual, group of individuals, partnership, corporation, association, cooperative, or any other entity;

(9) the term "producer" means any person engaged in the production of milk for commercial use;

(10) the term "research" means studies testing the effectiveness of market development and promotion efforts, studies relating to the nutritional value of milk and dairy products, and other related efforts to expand demand for milk and dairy products;

(11) the term "Secretary" means the Secretary of Agriculture unless the context specifies otherwise; and

(12) the term "United States" means the several States and the territories and possessions of the United States, except that for purposes of sections 4532, 4534(a), and 4537 of this title, and paragraph (7) of this section, such term means the forty-eight contiguous States in the continental United States.

§ 4532. Establishment of National Dairy Research Endowment Institute

The Secretary of Agriculture may establish in the Department of Agriculture a National Dairy Research Endowment Institute whose function shall be to aid the dairy industry through the implementation of the dairy products research order, which its board of trustees shall administer, and the use of monies made available to its board of trustees from the Dairy Research Trust Fund to implement the order. In implementing the order, the Institute shall provide a permanent system for funding scientific research activities designed to

facilitate the expansion of markets for milk and dairy products marketed in the United States. The Institute shall be headed by a board of trustees composed of the members of the National Dairy Promotion and Research Board. The board may appoint from among its members an executive committee whose membership shall reflect equally each of the different regions in the United States in which milk is produced. The executive committee shall have such duties and powers as are delegated to it by the board. The members of the board shall serve without compensation. While away from their homes or regular places of business in the performance of services for the board, members of the board shall be allowed reasonable travel expenses, including a per diem allowance in lieu of subsistence, as recommended by the board and approved by the Secretary, except that there shall be no duplication of payment for such expenses.

§ 4534. Required terms of order; agreements under order; records

(a) Required terms

The dairy products research order issued under section 4533(b) of this title shall--

(1) provide for the establishment and administration, by the Institute, of appropriate scientific research activities designed to facilitate the expansion of markets for dairy products marketed in the United States;

(2) specify the powers of the board, including the powers to--

(A) receive and evaluate, or on its own initiative develop and budget for, research plans or projects designed to--

(i) increase the knowledge of human nutritional needs and the relationship of milk and dairy products to these needs;

(ii) improve dairy processing technologies, particularly those appropriate to small- and medium-sized family farms;

(iii) develop new dairy products; and

(iv) appraise the effect of such research on the marketing of dairy products;

(B) make recommendations to the Secretary regarding such plans and projects;

(C) administer the order in accordance with its terms and provisions;

(D) make rules and regulations to effectuate the terms and provisions of the order;

(E) receive, investigate, and report to the Secretary complaints of violations of the order;

(F) recommend to the Secretary amendments to the order;

(G) enter into agreements, with the approval of the Secretary, for the conduct of activities authorized under the order and for payment of the cost of such activities with any monies in the Fund other than monies appropriated or transferred by the Secretary to the Fund;

(H) with the approval of the Secretary, establish advisory committees composed of individuals other than members of the board, and pay the necessary and reasonable expenses and fees of the members of such committees; and

(I) with the approval of the Secretary, appoint or employ such persons, other than members of the board, as the board deems necessary and define the duties and determine the compensation of each;

(3) specify the duties of the board, including the duties to--

(A) develop, and submit to the Secretary for approval before implementation, any research plan or project to be carried out under this subchapter;

(B) submit to the Secretary for approval, budgets, on a fiscal year basis, of the board's anticipated expenses and disbursements in the administration of the order, including projected costs of carrying out dairy products research plans and projects;

(C) prepare and make public, at least annually, a report of the board's activities and an accounting for funds received and expended by the board;

(D) maintain such books and records (which shall be available to the Secretary for inspection and audit) as the

Secretary may prescribe;

(E) prepare and submit to the Secretary, from time to time, such reports as the Secretary may prescribe; and

(F) account for the receipt and disbursement of all funds entrusted to the board;

(4) prohibit any monies received under this subchapter by the board to be used in any manner for the purpose of influencing governmental policy or actions, except as provided in paragraph (2)(F); and

(5) require that each person receiving milk from producers for commercial use and any person marketing milk of that person's own production directly to consumers maintain and make available for inspection by the Secretary such books and records as may be required by the order and file with the Secretary reports at the time, in the manner, and having the content prescribed by the order.

(b) Agreements under order

Any agreement made under subsection (a)(2)(G) of this section shall provide that--

(1) the person with whom such agreement is made shall develop and submit to the board a research plan or project together with a budget that shows estimated costs to be incurred to carry out such plan or project;

(2) such plan or project shall become effective on the approval of the Secretary; and

(3) such person shall keep accurate records of all of its transactions, account for funds received and expended, make periodic reports to the board of activities conducted to carry out such plan or project, and submit such other reports as the Secretary or the board may require.

(c) Confidentiality of records; disclosure exceptions; penalty for violation

(1) Information, books, and records made available to, and reports filed with, the Secretary under subsection (a)(6) of this section shall be kept confidential by all officers and employees of the Department, except that such information, books,

records, and reports as the Secretary deems relevant may be disclosed by such officers and employees in any suit or administrative proceeding that is brought at the request of the Secretary or to which the Secretary or any officer of the United States is a party, and that involves the order issued under section 4533(b) of this title.

(2) Paragraph (1) shall not be construed to prohibit--

(A) the issuance of general statements, based on such information, books, records, and reports, of the number of persons subject to the order or of statistical data collected from such persons if such statements do not specifically identify the data furnished by any one of such persons; or

(B) the publication, at the direction of the Secretary, of the name of any person violating the order, together with a statement of the particular provisions of the order violated by the person.

(3) No information obtained under the authority of this section may be made available to any agency, officer, or employee of the United States for any purpose other than the implementation of this subchapter and any investigatory or enforcement action necessary to implement this subchapter. Any person who violates this paragraph shall be subject to a fine of not more than $1,000, or to imprisonment for not more than one year, or both, and, if such person is employed by the board or the Department, shall be terminated from such employment.

§ 4535. Petition and review; enforcement; investigations

The provisions of sections 4509, 4510, and 4511 of this title shall apply, except when inconsistent with this subchapter, to the Institute, the board, the persons subject to the order issued under section 4533(b) of this title, the jurisdiction of district courts of the United States, and the authority of the Secretary under this subchapter in the same manner as such sections apply with respect to subchapter I of this chapter.

§ 4537. Termination of order, Institute, and Fund

(a) Termination or suspension of order

The Secretary, whenever the Secretary finds that the order issued under this subchapter or any provision of such order obstructs or does not tend to facilitate the expansion of markets for milk and dairy products marketed in the United States, shall terminate or suspend the operation of the order or such provision.

(b) Dissolution of Institute

If the Secretary terminates the order, the Institute shall be dissolved 180 days after the termination of the order.

(c) Disposal of moneys in Fund

If the Institute is dissolved for any reason, the moneys remaining in the Fund shall be disposed of as shall be agreed to by the board and the Secretary.

§ 4538. Additional authority

(a) No provision of this subchapter shall be construed to preempt or supersede any other program relating to milk or dairy products research organized and operated under the laws of the United States or any State.

(b) The provisions of this subchapter applicable to the order issued under section 4533(b) of this title shall be applicable to any amendment to the order.

APPENDIX G

TITLE 7--AGRICULTURE

PART 1150--DAIRY PROMOTION PROGRAM

--Table of Contents

Subpart--Dairy Promotion and Research Order

Sec. 1150.101 Act.
Definitions

Sec. 1150.102 Department.
Department means the United States Department of Agriculture.

Sec. 1150.103 Secretary.
Secretary means the Secretary of Agriculture of the United States or any other officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act in the Secretary's stead.

Sec. 1150.104 Board.
Board means the National Dairy Promotion and Research Board established pursuant to Sec. 1150.131.

Sec. 1150.105 Person.

Person means any individual, group of individuals, partnership, corporation, association, cooperative or other entity.

Sec. 1150.106 United States.

United States means the 48 contiguous States in the continental United States.

Sec. 1150.107 Fiscal period.

Fiscal period means the calendar year or such other annual

period as the Board may determine.

Sec. 1150.108 Eligible organization.

Eligible organization means any organization which has been certified by the Secretary pursuant to Secs. 1150.270 through 1150.278 of this part.

Sec. 1150.109 Qualified State or regional program.

Qualified State or regional program means any State or regional dairy product promotion, research or nutrition education program which is certified as a qualified program pursuant to Sec. 1150.153.

Sec. 1150.110 Producer.

Producer means any person engaged in the production of milk for commercial use.

Sec. 1150.111 Milk.

Milk means any class of cow's milk produced in the United States.

Sec. 1150.112 Dairy products.

Dairy products means products manufactured for human consumption which are derived from the processing of milk, and includes fluid milk products.

Sec. 1150.113 Fluid milk products.

Fluid milk products means those milk products normally consumed in liquid form as a beverage.

Sec. 1150.114 Promotion.

Promotion means actions such as paid advertising, sales promotion, and publicity to advance the image and sales of, and demand for, dairy products generally.

Sec. 1150.115 Research.

Research means studies testing the effectiveness of market development and promotion efforts, studies relating to the nutritional value of milk and dairy products, and other related efforts to expand demand for dairy products.

Sec. 1150.116 Nutrition education.

Nutrition education means those activities intended to broaden the understanding of sound nutritional principles, including the role of milk and dairy products in a balanced diet.

Sec. 1150.117 Plans and projects.

Plans and projects means promotion, research and nutrition education plans, studies or projects pursuant to Secs. 1150.139, 1150.140 and 1150.161.

Sec. 1150.118 Marketing.

Marketing means the sale or other disposition in commerce of dairy products.

Sec. 1150.119 Cooperative association.

Cooperative association means any cooperative marketing association of producers which is organized under the provisions of the Act of Congress of February 18, 1922, as amended, known as the ``Capper-Volstead Act".

Sec. 1150.131 Establishment and membership.

(a) There is hereby established a National Dairy Promotion and Research Board of thirty-six members. For purposes of nominating producers to the Board, the United States shall be divided into thirteen geographic regions and the number of Board members from each region shall be as follows:

(1) One member from region number one comprised of the following States: Washington and Oregon.

(2) Six members from region number two comprised of the following State: California.

(3) Three members from region number three comprised of the following States: Arizona, Colorado, Idaho, Montana, Nevada, Utah, and Wyoming.

(4) Three members from region number four comprised of the following States: Arkansas, Kansas, New Mexico, Oklahoma and Texas.

(5) Three members from region number five comprised of the following States: Minnesota, North Dakota and South Dakota.

(6) Five members from region number six comprised of the following State: Wisconsin.

(7) Two members from region number seven comprised of the following States: Illinois, Iowa, Missouri, and Nebraska.

(8) One member from region number eight comprised of the following States: Alabama, Kentucky, Louisiana, Mississippi and Tennessee.

(9) Three members from region number nine comprised of the following States: Indiana, Michigan, Ohio and West Virginia.

(10) Two members from region number ten comprised of the following States: Florida, Georgia, North Carolina, South Carolina and Virginia.

(11) Three members from region number eleven comprised of the following States: Delaware, Maryland, New Jersey and Pennsylvania.

(12) Three members from region number twelve comprised of the following State: New York.

(13) One member from region number thirteen comprised of the following States: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont.

(b) The Board shall be composed of milk producers appointed by the Secretary either from nominations submitted pursuant to Sec. 1150.133 or in accordance with Sec. 11150.136. A milk producer may be nominated only to represent the region in which such producer's milk is produced.

(c) At least every five years, and not more than every three years, the Board shall review the geographic distribution of milk production volume throughout the United States and, if

warranted, shall recommend to the Secretary a reapportionment of regions and/or a modification of the number of members from regions in order to best reflect the geographic distribution of milk production volume in the United States.

(d) The number of members for each region which shall serve on the Board shall be determined by dividing the total pounds of milk produced in the United States for the calendar year previous to the date of review by 36 which provides a factor of pounds of milk per member, and then dividing the total pounds of milk for each region by such factor.

(e) In determining the volume of milk produced in the United States, the Board and the Secretary shall utilize the information received by the Board pursuant to Sec. 1150.171 and data published by the Department.

Sec. 1150.132 Term of office.

(a) The members of the Board shall serve for terms of three years, except that the members appointed to the initial Board shall serve proportionately, for terms of one, two and three years.

(b) Each member of the Board shall serve until October 31 of the year in which his/her term expires, except that a retiring member may serve until a successor is appointed.

(c) No member shall serve more than two consecutive terms.

Sec. 1150.133 Nominations.

Nominations for members of the Board shall be made in the following manner:

(a) Upon effectuation of this provision, the Secretary shall solicit nominations for the initial Board from all eligible organizations. If the Secretary determines that a substantial number of producers are not members of, or their interests are not represented by, such eligible organizations, the Secretary shall also solicit nominations from such producers through general farmer organizations or by other means.

(b) After the appointment of the initial Board, the Secretary shall announce at least 120 days in advance when a Board member's term is expiring and shall solicit nominations for that position in the manner described in paragraph (a) of this section. Nominations for such position should be submitted to the Secretary not less than 60 days prior to the expiration of such term.

(c) An eligible organization may submit nominations only for positions on the Board that represent regions in which such eligible organization can establish that it represents a substantial number of producers. If there is more than one Board position for any such region, the organization may submit nominations for each position.

(d) Where there is more than one eligible organization representing producers in a specific region, they may caucus and jointly nominate producers for each position representing that region on the Board for which a member is to be appointed. If joint agreement is not reached with respect to any such nominations, or if no caucus is held, each eligible organization may submit to the Secretary nominations for each appointment to be made to represent that region.

Sec. 1150.134 Nominee's agreement to serve.

Any producer nominated to serve on the Board shall file with the Secretary at the time of the nomination a written agreement to:

(a) Serve on the Board if appointed;

(b) Disclose any relationship with any organization that operates a qualified State or regional program or has a contractual relationship with the Board; and

(c) Withdraw from participation in deliberations, decision-making, or voting on matters where paragraph (b) applies.

Sec. 1150.135 Appointment.

From the nominations made pursuant to Sec. 1150.133, the

Secretary shall appoint the members of the Board on the basis of representation provided for in Sec. 1150.131(a).

Sec. 1150.136 Vacancies.

To fill any vacancy occasioned by the death, removal, resignation, or disqualification of any member of the Board, the Secretary shall appoint a successor from the most recent list of nominations for the position or from nominations made by the Board.

Sec. 1150.137 Procedure.

(a) A majority of the members shall constitute a quorum at a properly convened meeting of the Board. Any action of the Board shall require the concurring votes of at least a majority of those present and voting. The Board shall establish rules concerning timely notice of meetings.

(b) The Board may take action upon the concurring votes of a majority of its members by mail, telephone, or telegraph when in the opinion of the chairman of the Board such action must be taken before a meeting can be called. Action taken by this emergency procedure is valid only if all members are notified and provided the opportunity to vote and any telephone vote is confirmed promptly in writing. Any action so taken shall have the same force and effect as though such action had been taken at a properly convened meeting of the Board.

Sec. 1150.138 Compensation and reimbursement.

The members of the Board shall serve without compensation but shall be reimbursed for necessary and reasonable expenses, including a per diem allowance as recommended by the Board and approved by the Secretary, incurred by them in the performance of their duties under this subpart.

Sec. 1150.139 Powers of the Board.

The Board shall have the following powers:

(a) To receive and evaluate, or on its own initiative develop, and budget for plans or projects to promote the use of fluid

milk and dairy products as well as projects for research and nutrition education and to make recommendations to the Secretary regarding such proposals;

(b) To administer the provisions of this subpart in accordance with its terms and provisions;

(c) To make rules and regulations to effectuate the terms and provisions of this subpart;

(d) To receive, investigate, and report to the Secretary complaints of violations of the provisions of this subpart;

(e) To disseminate information to producers or eligible organizations through programs or by direct contact utilizing the public postage system or other systems;

(f) To select committees and subcommittees of Board members, and to adopt such rules for the conduct of its business as it may deem advisable;

(g) To establish advisory committees of persons other than Board members and pay the necessary and reasonable expenses and fees of the members of such committees;

(h) To recommend to the Secretary amendments to this subpart; and

(i) With the approval of the Secretary, to invest, pending disbursement pursuant to a plan or project, funds collected through assessments authorized under Sec. 1150.152 in, and only in, obligations of the United States or any agency thereof, in general obligations of any State or any political subdivision thereof, in any interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System, or in obligations fully guaranteed as to principal and interest by the United States.

Sec. 1150.140 Duties of the Board.

The Board shall have the following duties:

(a) To meet not less than annually, and to organize

and select from among its members a chairman and such other officers as may be necessary;

(b) To appoint from its members an executive committee whose membership shall equally reflect each of the different regions in the United States in which milk is produced, and to delegate to the committee authority to administer the terms and provisions of this subpart under the direction of the Board and within the policies determined by the Board;

(c) To appoint or employ such persons as it may deem necessary and define the duties and determine the compensation of each;

(d) To review all programs that promote milk and dairy products on a brand or trade name basis that have requested certification pursuant to Sec. 1150.153, and to recommend to the Secretary whether such request should be granted;

(e) To develop and submit to the Secretary for approval, promotion, research, and nutrition education plans or projects resulting from research or studies conducted either by the Board or others;

(f) To solicit, among other proposals, research proposals that would increase the use of fluid milk and dairy products by the military and by persons in developing nations, and that would demonstrate the feasibility of converting surplus nonfat dry milk to casein for domestic and export use;

(g) To prepare and submit to the Secretary for approval, budgets on a fiscal period basis of its anticipated expenses and disbursements in the administration of this subpart, including probable costs of promotion, research and nutrition education plans or projects, and also including a general description of the proposed promotion, research and nutrition education programs contemplated therein;

(h) To maintain such books and records, which shall

be available to the Secretary for inspection and audit, and prepare and submit such reports from time to time to the Secretary as the Secretary may prescribe, and to make appropriate accounting with respect to the receipt and disbursement of all funds entrusted to it;

(i) With the approval of the Secretary, to enter into contracts or agreements with national, regional or State dairy promotion and research organizations or other organizations or entities for the development and conduct of activities authorized under Secs. 1150.139 and 1150.161, and for the payment of the cost thereof with funds collected through assessments pursuant to Sec. 1150.152. Any such contract or agreement shall provide that:

(1) The contractors shall develop and submit to the Board a plan or project together with a budgets or budget which shall show the estimated cost to be incurred for such plan or project;

(2) Any such plan or project shall become effective upon approval of the Secretary; and

(3) The contracting party shall keep accurate records of all of its transactions and make periodic reports to the Board of activities conducted and an accounting for funds received and expended, and such other reports as the Secretary or the Board may require. The Secretary or employees of the Board may audit periodically the records of the contracting party;

(j) To prepare and make public, at least annually, a report of its activities carried out and an accounting for funds received and expended;

(k) To have an audit of its financial statements conducted by a certified public accountant in accordance with generally accepted auditing standards, at least once each fiscal period and at such other times as the Secretary may request, and to submit a copy of each such audit report to the Secretary;

(l) To give the Secretary the same notice of meetings of the Board, committees of the Board and advisory committees as is given to such Board or committee members in order that the Secretary, or a representative of the Secretary, may attend such meetings;

(m) To submit to the Secretary such information pursuant to this subpart as may be requested; and

(n) To encourage the coordination of programs of promotion, research and nutrition education designed to strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products produced in the United States.

Sec. 1150.151 Expenses.

(a) The Board is authorized to incur such expenses (including provision for a reasonable reserve) as the Secretary finds are reasonable and likely to be incurred by the Board for its maintenance and functioning and to enable it to exercise its powers and perform its duties in accordance with the provisions of this subpart. However, after the first full year of operation of the order, administrative expenses incurred by the Board shall not exceed 5 percent of the projected revenue of that fiscal year. Such expenses shall be paid from assessments collected pursuant to Sec. 1150.152.

(b) The Board shall reimburse the Secretary, from assessments collected pursuant to Sec. 1150.152, for administrative costs incurred by the Department after May 1, 1984.

Sec. 1150.152 Assessments.

(a) Each person making payment to a producer for milk produced in the United States and marketed for commercial use shall collect an assessment on all such milk handled for the account of the producer at the rate of 15 cents per hundredweight of milk for commercial use or the equivalent thereof and shall remit the assessment to the Board.

(b) Any producer marketing milk of that producer's own

production in the form of milk or dairy products to consumers, either directly or through retail or wholesale outlets, shall remit to the Board an assessment on such milk at the rate of 15 cents per hundredweight of milk for commercial use or the equivalent thereof.

(c) In determining the assessment due from each producer pursuant to Sec. 1150.152 (a) and (b), a producer who is participating in a qualified State or regional program(s) shall receive a credit for contributions to such program(s), but not to exceed the following amounts:

(1) In the case of contributions for milk marketed on or before May 31, 1984, up to the actual rate of contribution that was in effect under such program(s) on November 29, 1983, not to exceed 15 cents per hundredweight of milk marketed.

(2) In all other cases, the credit shall not exceed 10 cents per hundredweight of milk marketed.

(d) In order for a producer described in Sec. 1150.152(a) to receive the credit authorized in Sec. 1150.152(c), either the producer or a cooperative association on behalf of the producer must establish to the person responsible for remitting the assessment to the Board that the producer is contributing to a qualified State or regional program.

Producers who contribute to a qualified program directly (other than through a payroll deduction) must establish with the person responsible for remitting the assessment to the Board, with validation by the qualified program, that they are making such contributions.

(e) In order for a producer described in Sec. 1150.152(b) to receive the credit authorized in Sec. 1150.152(c), the producer and the applicable qualified State or regional program must establish to the Board that the producer is contributing to a qualified State or regional program.

(f) The collection of assessments pursuant to Sec. 1150.152(a) and (b) shall begin with respect to milk marketed on and after

the effective date of this section and shall continue until terminated by the Secretary. If the Board is not constituted by the date the first assessments are to be collected, the Secretary shall have the authority to receive the assessments on behalf of the Board. The Secretary shall remit such assessments to the Board when it is constituted.

(g) Each person responsible for the remittance of the assessment pursuant to Sec. 1150.152(a) and (b) shall remit the assessment to the Board not later than the last day of the month following the month in which the milk was marketed.

(h) Money remitted to the Board shall be in the form of a negotiable instrument made payable to ``National Dairy Promotion and Research Board.'' Remittances and reports specified in Sec. 1150.171 shall be mailed to the location designated by the Secretary or the Board.

Sec. 1150.153 Qualified State or regional dairy product promotion, research or nutrition education programs.

(a) Any organization which conducts a State or regional dairy product promotion, research or nutrition education program may apply to the Secretary for certification of qualification so that producers may receive credit pursuant to Sec. 1150.152(c) for contributions to such program.

(b) In order to be certified by the Secretary as a qualified program, the program must:

(1) Conduct activities as defined in Secs. 1150.114, 1150.115, and 1150.116 that are intended to increase consumption of milk and dairy products generally;

(2) Except for programs operated under the laws of the United States or any State, have been active and ongoing before enactment of the Act;

(3) Be financed primarily by producers, either individually or through cooperative associations;

(4) Not use a private brand or trade name in its advertising and promotion of dairy products unless the Board

recommends and the Secretary concurs that such preclusion should not apply;

(5) Certify to the Secretary that any requests from producers for refunds under the program will be honored by forwarding to either the Board or a qualified State or regional program designated by the producer that portion of such refunds equal to the amount of credit that otherwise would be applicable to that program pursuant to Sec. 1150.152(c); and

(6) Not use program funds for the purpose of influencing governmental policy or action.

(c) An application for certification of qualifications of any State or regional dairy product promotion, research or nutrition education program which does not satisfy the requirements specified in paragraph (b) of this section shall be denied. The certification of any qualified program which fails to satisfy the requirements specified in paragraph (b) of this section after certification shall be subject to suspension or termination.

(1) Prior to the denial of an application for certification of qualification, or the suspension or termination of an existing certification, the Director of the Dairy Division shall afford the applicant or the holder of an existing certification an opportunity to achieve compliance with the requirements for certification within a reasonable time, as determined by the Director.

(2) Any State or regional dairy product promotion, research or nutrition education program whose application for certification of qualification is to be denied, or whose certification of qualification is to be suspended or terminated shall be given written notice of such pending action and shall be afforded an opportunity to petition the Secretary for a review of the action. The petition shall be in writing and shall state the facts relevant to the matter for which the review is sought, and whether petitioner desires an informal hearing. If an informal hearing is not requested, the Director of the Dairy Division shall issue a final decision setting forth the action to be taken

and the basis for such action. If petitioner requests a hearing, the Director of the Dairy Division, or a person designated by the Director, shall hold an informal hearing in the following manner:

(i) Notice of a hearing shall be given in writing and shall be mailed to the last known address of the petitioner or of the State or regional program, or to an officer thereof, at least 20 days before the date set for the hearing. Such notice shall contain the time and place of the hearing and may contain a statement of the reason for calling the hearing and the nature of the questions upon which evidence is desired or upon which argument may be presented. The hearing place shall be as convenient to the State or regional program as can reasonably be arranged.

(ii) Hearings are not to be public and are to be attended only by representatives of the petitioner or the State or regional program and of the U.S. Government, and such other parties as either the State or regional program or the U.S. Government desires to have appear for purposes of submitting information or as counsel.

(iii) The Director of the Dairy Division, or a person designated by the Director, shall be the presiding officer at the hearing. The hearing shall be conducted in such manner as will be most conducive to the proper disposition of the matter. Written statements or briefs may be filed by the petitioner or the State or regional program, or other participating parties, within the time specified by the presiding officer.

(iv) The presiding officer shall prepare preliminary findings setting forth a recommendation as to what action should be taken and the basis for such action. A copy of such findings shall be served upon the petitioner or the State or regional program by mail or in person. Written exceptions to the findings may be filed within 10 days after service thereof.

(v) After due consideration of all the facts and the exceptions, if any, the Director of the Dairy Division shall issue a final decision setting forth the action to be taken and the basis for such action.

Sec. 1150.154 Influencing governmental action.

No funds collected by the Board under this subpart shall in any manner be used for the purpose of influencing governmental policy or action, except to recommend to the Secretary amendments to this subpart.

Sec. 1150.155 Adjustment of accounts.

Whenever the Board or the Department determines through an audit of a person's reports, records, books or accounts or through some other means that additional money is due the Board or that money is due such person from the Board, such person shall be notified of the amount due. The person shall then remit any amount due the Board by the next date for remitting assessments as provided in Sec. 1150.152. Overpayments shall be credited to the account of the person remitting the overpayment and shall be applied against amounts due in succeeding months.

Sec. 1150.156 Charges and penalties.

(a) Late-payment charge. Any unpaid assessments to the Board pursuant to Sec. 1150.152 shall be increased 1.5 percent each month beginning with the day following the date such assessments were due. Any remaining amount due, which shall include any unpaid charges previously made pursuant to this section, shall be increased at the same rate on the corresponding day of each month thereafter until paid. For the purpose of this section, any assessment that was determined at a date later than prescribed by this subpart because of a person's failure to submit a report to the Board when due shall be considered to have been payable by the date it would have been due if the report had been filed when due. The timeliness of a payment to the Board shall be based on the applicable postmark date or the date actually received by the Board, whichever is

earlier.

(b) Penalties. Any person who willfully violates any provision of this subpart shall be assessed a civil penalty by the Secretary of not more than $1,000 for each such violation and, in the case of a willful failure to pay, collect, or remit the assessment as required by this subpart, in addition to the amount due, a penalty equal to the amount of the assessment on the quantity of milk as to which the failure applies. The amount of any such penalty shall accrue to the United States and may be recovered in a civil suit brought by the United States. The remedies provided in this section shall be in addition to, and not exclusive of, other remedies that may be available by law or in equity.

Sec. 1150.161 Promotion, research and nutrition education.

(a) The Board shall receive and evaluate, or on its own initiative develop, and submit to the Secretary for approval any plans or projects authorized in Secs. 1150.139, 1150.140 and this section. Such plans or projects shall provide for:

(1) The establishment, issuance, effectuation, and administration of appropriate plans or projects for promotion, research and nutrition education with respect to milk and dairy products; and

(2) The establishment and conduct of research and studies with respect to the sale, distribution, marketing and utilization of milk and dairy products and the creation of new products thereof, to the end that marketing and utilization of milk and dairy products may be encouraged, expanded, improved or made more acceptable. Included shall be research and studies of proposals intended to increase the use of fluid milk and dairy products by the military and by persons in developing nations and proposals intended to demonstrate the feasibility of converting nonfat dry milk to casein for domestic and export use.

(b) Each plan or project authorized under Sec. 1150.161(a)

shall be periodically reviewed or evaluated by the Board to insure that the plan or project contributes to an effective program of promotion, research and nutrition education. If it is found by the Board that any such plan or project does not further the purposes of the Act, the Board shall terminate such plan or project.

(c) No plan or project authorized under Sec. 1150.161(a) shall make use of unfair or deceptive acts or practices with respect to the quality, value or use of any competing product.

Sec. 1150.171 Reports.

Each producer marketing milk of that producer's own production directly to consumers and each person making payment to producers and responsible for the collection of the assessment under Sec. 1150.152 shall be required to report at the time for remitting assessments to the Board such information as may be required by the Board or by the Secretary. Such information may include but not be limited to the following:

(a) The quantity of milk purchased, initially transferred or which, in any other manner, are subject to the collection of the assessment;

(b) The amount of assessment remitted;

(c) The basis, if necessary, to show why the remittance is less than the number of hundredweights of milk multiplied by 15 cents; and

(d) The date any assessment was paid.

Sec. 1150.172 Books and records.

Each person who is subject to this subpart, and other persons subject to Sec. 1150.171, shall maintain and make available for inspection by employees of the Board and the Secretary such books and records as are necessary to carry out the provisions of this subpart and the regulations issued hereunder, including such records as are necessary to verify any reports required. Such records shall be retained for at least two years beyond the

fiscal period of their applicability.

Sec. 1150.173 Confidential treatment.

All information obtained from such books, records or reports under the Act and this subpart shall be kept confidential by all persons, including employees and former employees of the Board, all officers and employees and all former officers and employees of the Department, and by all officers and all employees and all former officers and employees of contracting agencies having access to such information, and shall not be available to Board members. Only those persons having a specific need for such information in order to effectively administer the provisions of this subpart shall have access to such information. In addition, only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the discretion, or upon the request, of the Secretary, or to which the Secretary or any officer of the United States is a party, and involving this subpart. Nothing in this section shall be deemed to prohibit:

(a) The issuance of general statements based upon the reports of the number of persons subject to this subpart or statistical data collected therefrom, which statements do not identify the information furnished by any person; and

(b) The publication, by direction of the Secretary, of the name of any person who has been adjudged to have violated this subpart, together with a statement of the particular provisions of the subpart violated by such person.

Sec. 1150.181 Proceedings after termination.

(a) Upon the termination of this subpart, the Board shall recommend not more than five of its members to the Secretary to serve as trustees for the purpose of liquidating the affairs of the Board. Such persons, upon designation by the Secretary, shall become trustees of all the funds and property owned, in the possession of, or under the control of the Board, including

unpaid claims or property not delivered or any other claim existing at the time of such termination.

(b) The said trustees shall:

(1) Continue in such capacity until discharged by the Secretary;

(2) Carry out the obligations of the Board under any contract or agreements entered into by it pursuant to Sec. 1150.140(i);

(3) From time to time account for all receipts and disbursements and deliver all property on hand, together with all books and records of the Board and of the trustees, to such persons as the Secretary may direct; and

(4) Upon the request of the Secretary, execute such assignments or other instruments necessary or appropriate to vest in such persons full title and right to all of the funds, property, and claims vested in the Board or the trustees pursuant to this subpart.

(c) Any person to whom funds, property, or claims have been transferred or delivered pursuant to this subpart shall be subject to the same obligation imposed upon the Board and upon the trustees.

(d) Any residual funds not required to defray the necessary expenses of liquidation shall be turned over to the Secretary to be used, to the extent practicable, in the interest of continuing one or more of the promotion, research or nutrition education plans or projects authorized pursuant to this subpart.

Sec. 1150.182 Effect of termination or amendment.

Unless otherwise expressly provided by the Secretary, the termination of this subpart or of any regulation issued pursuant hereto, or the issuance of any amendment to either thereof, shall not:

(a) Affect or waive any right, duty, obligation, or liability which shall have arisen or which may hereafter arise in connection with any provision of this subpart or any regulation

issued thereunder;

(b) Release or extinguish any violation of this subpart or any regulation issued thereunder; or

(c) Affect or impair any rights or remedies of the United States, or of the Secretary, or of any person, with respect to any such violation.

Sec. 1150.183 Personal liability.

No member or employee of the Board shall be held personally responsible, either individually or jointly, in any way whatsoever to any person for errors in judgment, mistakes, or other acts of either commission or omission of such member or employee, except for acts of dishonesty or willful misconduct.

Sec. 1150.184 Patents, copyrights, inventions and publications.

Any patents, copyrights, trademarks, inventions or publications developed through the use of funds collected under the provisions of this subpart shall be the property of the U.S. Government as represented by the Board, and shall, along with any rents, royalties, residual payments, or other income from the rental, sale, leasing, franchising, or other uses of such patents, copyrights, inventions, or publications, inure to the benefit of the Board. Upon termination of this subpart, Sec. 1150.181 shall apply to determine disposition of all such property.

Sec. 1150.185 Amendments.

The Secretary may from time to time amend provisions of this part. Any interested person or organization affected by the provisions of the Act may propose such amendments to the Secretary.

Sec. 1150.186 Separability.

If any provision of this subpart is declared invalid or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of this subpart or the

applicability thereof to other persons or circumstances shall not be affected thereby.

Sec. 1150.187 Paperwork Reduction Act assigned number.

The information collection and recordkeeping requirements contained in Secs. 1150.133, 1150.152, 1150.153, 1150.171, 1150.172, 1150.202, 1150.204, 1150.205, 1150.211 and 1150.273 of these regulations (7 CFR Part 1150) have been approved by the Office of Management and Budget (OMB) under the provisions of 44 U.S.C. Chapter 35 and have been assigned OMB Control Number 0581-0147.

Sec. 1150.270 General.

Organizations must be certified by the Secretary that they are eligible to represent milk producers and to participate in the making of nominations of milk producers to serve as members of the National Dairy Promotion and Research Board as provided in the Dairy and Tobacco Adjustment Act of 1983. Certifications of eligibility required of the Secretary shall be conducted in accordance with this subpart.

Sec. 1150.271 Definitions.

As used in this subpart:

(a) Act means Title I, Subtitle B, of the Dairy and Tobacco Adjustment Act of 1983, Pub. L. 98-180, 97 Stat. 1128, as approved November 29, 1983, and any amendments thereto;

(b) Department means the United States Department of Agriculture;

(c) Secretary means the Secretary of Agriculture of the United States, or any officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated to act in the Secretary's stead;

(d) Dairy Division means the Dairy Division of the Department's Agricultural Marketing Service;

(e) Producer means any person engaged in the production of milk for commercial use;

(f) Dairy products means products manufactured for human consumption which are derived from the processing of milk, and includes fluid milk products; and

(g) Fluid milk products means those milk products normally consumed in liquid form as a beverage.

Sec. 1150.272 Responsibility for administration of regulations.

The Dairy Division shall have the responsibility for administering the provisions of this subpart.

Sec. 1150.273 Application for certification.

Any organization whose membership consists primarily of milk producers may apply for certification. Applicant organizations should supply information for certification using as a guide ``Application for Certification of Organizations,'' Form DA-26. Form DA-26 may be obtained from the Dairy Division, Agricultural Marketing Service, United States Department of Agriculture, Washington, DC 20250.

Sec. 1150.274 Certification standards.

(a) Certification of eligible organizations shall be based, in addition to other available information, on a factual report submitted by the organization, which shall contain information deemed relevant and specified by the Secretary for the making of such determination, including the following:

(1) Geographic territory covered by the organization's active membership;

(2) Nature and size of the organization's active membership including the total number of active milk producers represented by the organization;

(3) Evidence of stability and permanency of the organization;

(4) Sources from which the organization's operating funds are derived;

(5) Functions of the organization; and

(6) The organization's ability and willingness to further the aims and objectives of the Act.

(b) The primary considerations in determining the eligibility of an organization shall be whether its membership consists primarily of milk producers who produce a substantial volume of milk, and whether the primary or overriding interest of the organization is in the production or processing of fluid milk and dairy products and promotion of the nutritional attributes of fluid milk and dairy products.

(c) The Secretary shall certify any organization which he finds meets the criteria under this section and his determination as to eligibility shall be final.

Sec. 1150.275 Inspection and investigation.

The Secretary shall have the right, at any time after an application is received from an organization, to examine such books, documents, papers, records, files, and facilities of an organization as he deems necessary to verify the information submitted and to procure such other information as may be required to determine whether the organization is eligible for certification.

Sec. 1150.276 Review of certification.

Certifications issued pursuant to this subpart are subject to termination or suspension if the organization does not currently meet the certification standards. A certified organization may be requested at any time to supply the Dairy Division with such information as may be required to show that the organization continues to be eligible for certification. Any information submitted to satisfy a request pursuant to this section shall be subject to inspection and investigation as provided in Sec. 1150.275.

Sec. 1150.277 Listing of certified organizations.

A copy of each certification shall be furnished by the Dairy Division to the respective organization. Copies also shall be

filed in the Dairy Division where they will be available for public inspection.

Sec. 1150.278 Confidential treatment.

All documents and other information submitted by applicant organizations and otherwise obtained by the Department by investigation or examination of books, documents, papers, records, files, or facilities shall be kept confidential by all employees of the Department. Only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in the issuance of general statements based upon the applications of a number of persons, which do not identify the information furnished by any one person.

PARTS 1151-1159 [RESERVED]

(2)

No. 99-439

In the Supreme Court of the United States

NATURE'S DAIRY, ET AL., PETITIONERS

v.

DAN GLICKMAN, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Acting Assistant Attorney General

BARBARA C. BIDDLE
JEFFRICA JENKINS LEE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether milk producers may, consistent with the First Amendment, be required to fund a generic advertising and promotion program for fluid milk and dairy products under an agricultural marketing order similar to that upheld in *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997).

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is unpublished, but the judgment is noted at 173 F.3d 429 (Table). The opinion of the district court (Pet. App. 9a-16a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1999. A petition for rehearing was denied on June 11, 1999 (Pet. App. 19a-20a). The petition for a writ of certiorari was filed on September 9, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Dairy and Tobacco Adjustment Act of 1983, Pub. L. No. 98-180, Tit. I, 97 Stat. 1136-1150 (codified at 7 U.S.C. 4501-4514 (1994 & Supp. IV 1998)) (Dairy Act), Congress declared that the "public interest" would be served by a "coordinated program of promotion" of milk and dairy products produced in the United States. 7 U.S.C. 4501(b). Congress perceived that such a program could "strengthen the dairy industry's position in the marketplace" and "maintain and expand domestic and foreign markets and uses" for its products. *Ibid.*

Accordingly, Congress directed the Secretary of Agriculture to promulgate a marketing order that would "provide for the establishment and administration of appropriate plans or projects for advertisement and promotion of the sale and consumption of dairy products, for research projects related thereto, [and] for nutrition education." 7 U.S.C. 4504(a). The marketing order was to be administered by a National Dairy Promotion and Research Board (Dairy Board) composed of at least 36 members, all milk producers, to be appointed by the Secretary. 7 U.S.C. 4504(b).[1] The activities of the Dairy Board were to be financed by an assessment on dairy producers of 15 cents per hundred-

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[1] Only milk producers (defined in the statute as persons engaged in the production of milk for commercial purposes, 7 U.S.C. 4502(h)) are eligible to serve on the Dairy Board. The Secretary appoints members from among nominees submitted by organizations that have been certified to represent milk producers. 7 U.S.C. 4505. The Secretary may also appoint members to the Board other than from nominations of such certified organizations if the Secretary determines that a substantial number of milk producers are not members of, or their interests are not represented by, those organizations. 7 U.S.C. 4504(b).

weight of milk produced for commercial use. 7 U.S.C. 4504(g).[2]

In 1984, the Secretary, acting pursuant to the Dairy Act, promulgated the Dairy Promotion and Research Order (Dairy Promotion Order). See 7 C.F.R. Pt. 1150. The Dairy Promotion Order established the Dairy Board, delineated its powers and duties, and imposed an assessment, at the statutory rate of 15 cents per hundredweight, on all milk produced in the 48 contiguous States for commercial use. See 7 C.F.R. 1150.131, 1150.139, 1150.140, 1150.152.

Congress required the Secretary to conduct a referendum of milk producers in 1985 to determine whether the Dairy Promotion Order should remain in effect. 7 U.S.C. 4506. The Secretary is also required to conduct such a referendum whenever ten percent of milk producers request one. 7 U.S.C. 4507(b). In 1985 and again in 1993, a majority of milk producers voted in favor of the Dairy Promotion Order. See Pet. App. 3a.[3]

2. Petitioners are milk producers subject to the Dairy Promotion Order. In June 1996, they filed a complaint alleging that the mandatory assessments infringe their First Amendment rights of freedom of speech and freedom of association. Pet. App. 10a; Pet. 4.[4]

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[2] Assessments are actually collected by milk handlers, *i.e.*, persons who purchase milk from milk producers for processing. 7 U.S.C. 4504(g). A producer who markets his own milk is responsible for remitting the required assessments to the Dairy Board. *Ibid.*

[3] In addition, the Secretary may terminate the Dairy Promotion Order on his own initiative if he determines that the Order no longer "tend[s] to effectuate the declared policy" of the Dairy Act. 7 U.S.C. 4507(a).

[4] The original complaint and the first amended complaint sought an order enjoining the Secretary and the Dairy Board from

The matter came before the district court for resolution on cross-motions for summary judgment. The court found this case to be legally indistinguishable from *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), which held that the First Amendment was not implicated by a marketing order that imposed compulsory assessments on handlers of California peaches, nectarines, and plums to fund generic advertising of those fruits. Pet. App. 12a-13a. The court noted that *Wileman Brothers* had rejected each of petitioners' First Amendment arguments: *i.e.*, that a mandatory assessment for generic advertising "restrains producers from communicating some messages to some audiences," "compels producers to engage in actual or symbolic speech," and "compels the producers to finance disagreeable political and ideological views." *Id.* at 13a.

The district court, following this Court's analysis in *Wileman Brothers*, concluded that the generic advertising program established by the Dairy Act serves "legitimate economic purposes" as part of a regulatory scheme designed to "strengthen[] the dairy industry's position in the marketplace and maintain[] and expand[] markets and uses for fluid milk and dairy products." Pet. App. 14a (quoting 7 U.S.C. 4501(b)). The court also pointed out that the generic advertising program does

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collecting or spending assessments from petitioners and a refund of any assessments previously collected from petitioners. On the government's motion, the district court dismissed the action for lack of jurisdiction because petitioners had failed to exhaust their administrative remedies as mandated by the Dairy Act. 7 U.S.C. 4509(a). The court, over the government's objection, later granted petitioners leave to file a second amended complaint directly challenging the constitutionality of the Dairy Act itself. Pet. App. 10a n.1.

not "bar[] [petitioners] from using their own funds for advertising" or "require[] them to engage personally and directly in advertising." *Id.* at 14a-15a. Nor does the generic advertising program "restrict [petitioners'] right to communicate any message, compel [them] to engage in speech, or compel them to endorse any political views with which they disagree." *Id.* at 15a. Accordingly, the court held that the generic advertising program "clearly survive[d]" petitioners' First Amendment challenge. *Ibid.*

The district court rejected petitioners' attempt to distinguish this case from *Wileman Brothers* on the ground that the marketing order in that case comprehensively regulated the affected commodities, whereas the marketing order in this case deals only with promotion, research, and nutrition education programs. The court found "nothing in the *Wileman* opinion that would indicate that it is inapplicable to a stand alone program such as the Dairy Program." Pet. App. 12a. The court added that "[d]airy products, like tree fruit, are subject to extensive governmental regulation." *Ibid.* The court specifically identified the regulation of the prices received by dairy producers under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, and the regulation of milk price supports under the Federal Agricultural Improvement and Reform Act of 1996, 7 U.S.C. 7251 *et seq.* Pet. App. 12a-13a.

Accordingly, the court granted the government's motion for summary judgment and dismissed petitioners' complaint in its entirety. Pet. App. 17a-18a.

3. The Sixth Circuit affirmed in an unpublished opinion that adopted the district court's reasoning in full. Pet. App. 1a-8a.

The court of appeals, like the district court, found no "constitutionally significant distinction" between the generic advertising program upheld in *Wileman Brothers* and the generic advertising program challenged in this case. Pet. App. 7a. The court agreed that "the Dairy Promotion Program, similar to the program in [*Wileman Brothers*], is part and parcel of a legitimate regulatory scheme for promotion of commodities." *Ibid.* The court added that the dairy promotion program does not "impose any restraint upon a producer from communicating any message to any audience," require any producer "to engage in actual or symbolic speech," or "compel any producer to endorse or fund any political or ideological view." *Ibid.*[5]

ARGUMENT

The Sixth Circuit's unpublished decision is correct, is compelled by this Court's decision in *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), and is consistent with the decisions of other courts of appeals. No reason therefore exists for this Court to revisit the constitutionality of federal programs requiring producers or distributors of an agricultural commodity to share the costs of its generic advertising. Indeed, the Court has twice since *Wileman Brothers* denied petitions for writs of certiorari in cases raising such issues. See *Goetz* v. *Glickman*, 119 S. Ct. 867

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[5] On appeal, the government renewed its argument that the district court lacked subject matter jurisdiction because petitioners had failed to exhaust their administrative remedies. The court of appeals upheld the district court's determination that petitioners were not required to exhaust administrative remedies because they were challenging "the constitutionality of the entire statute." Pet. App. 5a.

(1999); *Cal-Almond, Inc.* v. *Department of Agric.*, 119 S. Ct. 57 (1998).

1. This Court's decision in *Wileman Brothers* is dispositive of petitioners' challenge to the generic advertising program established by the Dairy Act. In *Wileman Brothers*, the Court held that regulations creating a generic advertising program for California peaches, nectarines, and plums, paid for by mandatory assessments on handlers of those fruits, did not implicate the First Amendment. The Court identified three factors that distinguish such generic advertising programs from laws that abridge freedom of speech in violation of the First Amendment. First, generic advertising programs "impose no restraint on the freedom of any producer to communicate any message to any audience." 521 U.S. at 469. Second, generic advertising programs "do not compel any person to engage in actual or symbolic speech," because persons "are not required themselves to speak, but are merely required to make contributions for advertising." *Id.* at 469, 471. And third, generic advertising programs "do not compel the producers to endorse or finance any political or ideological views." *Id.* at 469-470. The Court explained that requiring the members of an industry to pay assessments for generic advertising, which does not promote "any particular message other than encouraging consumers to buy [their product]," does not "engender any crisis of conscience" or otherwise interfere with any "freedom of belief." *Id.* at 471-472.

The generic advertising program in this case is, as the courts below recognized (Pet. App. 7a, 12a-13a), legally indistinguishable from the generic advertising program in *Wileman Brothers*. Both generic advertising programs are part of larger regulatory schemes for promotion, research, and consumer education involving

their respective commodities. Compare 7 U.S.C. 608c(6)(I) with 7 U.S.C. 4502, 4504 (1994 & Supp. IV 1998). Both generic advertising programs are implemented by committees of individuals in their respective industries and funded by assessments paid by members of those industries. Compare 7 U.S.C. 608c(6)(I), 610(b)(2)(ii) with 7 U.S.C. 4504(b) and (g). And both generic advertising programs provide mechanisms by which members of the industry can seek to modify or terminate those programs. Compare 7 U.S.C. 608c(16)(A)(i) and (B), 608c(15)(A) with 7 U.S.C. 4507(a) and (b), 4509. Accordingly, like the generic advertising program in *Wileman Brothers*, the generic advertising program here is simply "a species of economic regulation," 521 U.S. at 477, that does not warrant special First Amendment scrutiny.

2. Petitioners attempt (Pet. 5) to distinguish *Wileman Bros.* on the ground that the generic advertising program for milk and dairy products, as opposed to the generic advertising program for California tree fruits, "is not part of a broader collective enterprise." Petitioners' argument is both factually and legally untenable.

First, in the dairy industry, as in the tree fruit industry, Congress has "displaced many aspects of independent business activity." 521 U.S. at 469. As the Senate Report on the Dairy Act noted, "[f]ederal [regulatory] programs have been deeply imbedded in the economic fabric of the United States dairy industry for more than 40 years." S. Rep. No. 163, 98th Cong., 1st Sess. 13 (1983). The Senate Report specifically identified four such programs: "[t]he dairy price support program which explicitly puts a floor under the price of manufacturing grade milk and thus maintains a floor under all milk prices"; "[t]he milk marketing order

program which establishes minimum prices for fluid grade milk in most parts of the country"; "[i]mport controls which protect the price support program"; and "[f]ederal cooperative policy which encourages the development of farmer-owned cooperatives." *Ibid.*; cf. *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 341-343 (1984) (describing the milk marketing order program); *Zuber* v. *Allen*, 396 U.S. 168, 172 (1969) (noting "the labyrinth of the federal milk marketing regulation provisions").[6]

Second, nothing in this Court's opinion in *Wileman Brothers* provides any justification for the distinction proposed by petitioners between marketing orders that deal only with promotion, research, and consumer education programs, as in this case, and marketing orders that regulate a commodity more comprehensively, as in *Wileman Brothers*. To the contrary, the Court granted certiorari in *Wileman Brothers* for the express purpose of resolving the conflict between the Ninth Circuit's decision in that case and the Third Circuit's decision in *United States* v. *Frame*, 885 F.2d 1119 (1989), cert. denied, 493 U.S. 1094 (1990). See 521 U.S. at 466-467. *Frame*, like the present case, involved a First Amendment challenge to a statute, the Beef Promotion and Research Act of 1985 (Beef Act), 7 U.S.C. 2901-2911, that deals only with "promotion and advertising, research, consumer information, and industry

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[6] Even the Dairy Act itself imposed regulations on the dairy industry aside from those at issue here. In particular, the Dairy Act established sliding levels of price supports for milk, directed the Secretary to provide a temporary reduction in the price received by producers for all milk marketed commercially, and required the Secretary to implement a paid diversion program. Pub. L. No. 98-180, § 102, 97 Stat. 1128 (codified at 7 U.S.C. 1446(d)(1) (Supp. I 1983)).

information" programs. 7 U.S.C. 2904(4)(B); see *Frame*, 885 F.2d at 1122-1123 (describing the Beef Act and noting that its "promotion and research programs" are "identical in most respects" to those for milk and dairy products under the Dairy Act and for six other commodities under other statutes). Surely, then, the Court understood *Wileman Brothers* as addressing the constitutionality not only of the particular generic advertising program in that case, but also of similar generic advertising programs involving other regulated commodities, whether those commodities are regulated by a single statute or marketing order or by multiple statutes or marketing orders.

Petitioners cite no decision of any court, and we are aware of none, adopting the distinction they propose between generic advertising programs established by marketing orders that regulate a commodity comprehensively and those established by marketing orders that regulate a commodity only in particular respects. The lower courts have relied on *Wileman Brothers* to sustain generic advertising programs established under statutes and marketing orders that deal only with promotion, research, and consumer education programs. See *Gallo Cattle Co.* v. *California Milk Advisory Bd.*, 185 F.3d 969, 974-978 (9th Cir. 1999) (rejecting a First Amendment challenge to the generic advertising program established by the State of California's Marketing Order for Research, Education and Promotion of Market Milk and Dairy Products); *Goetz* v. *Glickman*, 149 F.3d 1131, 1139 (10th Cir. 1998) (rejecting a First Amendment challenge to the generic advertising program established by the Beef Act), cert. denied, 119 S. Ct. 867 (1999). Indeed, in *Gallo Cattle*, a milk producer argued, as petitioners do here, that "because th[e] single marketing order [at issue] does

not regulate the milk producers to the extent that the marketing order in *Wileman* regulated the tree fruit growers, *Wileman* is inapplicable." 185 F.3d at 974-975 n.5. The Ninth Circuit rejected as "specious" the milk producer's "attempt to limit the focus to a single marketing order rather than the entire regulatory scheme," concluding that "[o]ur approach of focusing on the overall regulatory scheme rather than on whether all regulations are contained in a single marketing order is entirely consistent with *Wileman*." *Ibid.*

3. Finally, petitioners' complaints (Pet. 14) about the wisdom and efficacy of the dairy promotion program present no issue for the Court's review. As the court of appeals concluded, "in the absence of constitutional infirmity, this Court must defer to the judgment of Congress" that the dairy promotion program serves the public interest. Pet. App. 8a; see *Wileman Bros.*, 521 U.S. at 474 ("Although one may indeed question the wisdom of such a program, its debatable features are insufficient to warrant special First Amendment scrutiny."). Nor are petitioners without means to seek the termination or modification of the Dairy Promotion Order through the political process. See, *e.g.*, 7 U.S.C. 4507(b).[7]

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[7] While petitioners suggest (Pet. 3, 12-13) that the bloc voting procedures improperly influence the outcome of any producer referendum, they raised no direct legal challenge to those procedures in the courts below. In any event, the validity of such bloc voting procedures has been consistently upheld against a variety of legal challenges. See, *e.g.*, *United States* v. *Rock Royal Coop.*, 307 U.S. 533, 578 (1939); *Cecelia Packing Corp.* v. *United States Dep't of Agric.*, 10 F.3d 616, 621-625 (9th Cir. 1993).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
Acting Assistant Attorney General

BARBARA C. BIDDLE
JEFFRICA JENKINS LEE
Attorneys

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NATURE'S DAIRY, et al.,
Petitioners,

v.

DAN GLICKMAN, AS SECRETARY OF AGRICULTURE, UNITED STATES DEPARTMENT OF AGRICULTURE, AND NATIONAL DAIRY PROMOTION BOARD,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF IN SUPPORT

BENJAMIN F. YALE
Counsel of Record

KRISTINE H. REED
BENJAMIN F. YALE & ASSOCIATES CO., L.P.A.
102 WEST WAPAKONETA STREET
P.O. BOX 100
WAYNESFIELD, OH 45896-0100
(419) 568-5751

Attorneys for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO 800-890-5001

16pp

QUESTION PRESENTED FOR REVIEW

Whether under the First Amendment business entities can be compelled to fund generic advertising and nutrition education when such compulsion is outside of any broader collective enterprise and the compelled speech component is not part of a regulatory scheme that otherwise constrains their freedom to act independently?

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ROBERT STERN, ET AL, SUPREME COURT PRACTICE, §5.7 (7th Edition) . . . . . (4)

REPLY ARGUMENT

1. The Sixth Circuit has just held that one commodity promotion program violates the First Amendment. In *United Foods, Inc. v. United States, et al.*, No.98-6436, 1999 Fed App. 0391P (6th Cir., Nov. 23, 1999), App. 73a, that circuit had before it a challenge to the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U. S. C. § 6101 *et seq*. In an opinion by Circuit Judge Merritt, it held that First Amendment analysis is appropriate in compelled funding of promotion. "Our interpretation of *Wileman* is that if either of the two elements is missing — either the collectivization of the industry or the purely commercial nature of the advertising — the First Amendment invalidates the compelled commercial speech." *Id.* at p. 7, App. 80a. The mushroom case creates the following dichotomy: producers who provide the milk for the cheese on a pizza are not entitled to the same First Amendment protection as those who supply the mushrooms.

The Respondents' brief, in contrast with the *United Foods* decision, raises the issue: when is regulation "extensive" enough that its participants forego their rights under the First Amendment? The question presented in this petition focuses on that issue. The dairy industry, though regulated, does not enjoy the uniformity or universality of regulation found in the summer fruit orders at issue in *Wileman Brothers*. Some producers, including some Petitioners, have chosen not to participate in the dairy industry regulation or enjoy regulated minimum prices.

Contrary to the Respondents' argument, the answer to the issue is found not in the extensiveness of the regulation, but the collectivism. Simply stated, a collective as an entity has its own right to a voice. Granting collectives such as the fruit

marketing committee the ability to collect fees to speak on behalf of the collective is not the result of regulation, but the existence of the collective itself. The failure of a named industry, such as dairy producers, to fully collectivize into an entity either voluntarily or by operation of law or rule, means that there are no members who must trade First Amendment protection in exchange for membership in the collective with its benefits. To the extent, and only to the extent, there is a collective for purposes other than speech, then speech germane to the collective is appropriate.

The Respondents' argument fails to explain at what degree the government involvement results in reduced freedom. Respondents at pp. 8-9. The transportation industry receives subsidization in the form of highways and traffic enforcement paid by the public. How, in deciding First Amendment issues, does that differ from dairy price supports? Do minimum wage laws and a public policy favoring labor unions and collective bargaining mean that workers, union or not, must participate in speech? Import duties and regulations are used to protect a myriad of industries, not just dairy. Do clothing and shoe manufacturers give up First Amendment rights in exchange for import quotas on clothing? A multitude of statutes promote the development of trade and commerce, not just the "federal cooperative policy" noted by the Respondent.

Alcohol and liquor, too, are heavily regulated industries having even their own provisions in a Constitutional Amendment. Nonetheless compelled speech of this regulated industry was held unlawful by this Court. *Rubin v. Coors Brewing Company,* 514 U.S. 476 (1995). Non profit organizations that enjoy favorable tax treatment, too, have not been compelled to speak. *Riley v. National Federation of Blind of N.C., Inc.*,487 U.S. 781 (1988).

The "extent of regulation" argument raises more questions than it answers. That is why the instant Question should be accepted and addressed. As an industry that is not fully collectivized as the California fruit industry yet enjoys more protection than the mushroom industry, the dairy industry generally, and the Dairy Promotion Program specifically, provide the opportunity to bring needed answers to this area of the law.

As *United Foods* shows, this Court's decision in *Glickman v. Wileman Bros. & Elliott,* 521 U.S. 457 (1997) is not dispositive of the instant petition as argued by Respondents. In *Wileman Brothers*, this Court considered the challenged advertising "as part of a broader collective enterprise" *Id.* at 458. Contrary to the Respondents' characterization of *Wileman Brothers,* the decision did not look at generic advertising but "marketing orders", or the collective activity, which included the challenged generic advertising. *Id.* at 469.

2. This Court has not expressly addressed the issue of whether compelled speech outside of a collective violates the First Amendment. *Wileman Brothers* suggested that membership in the collective group was significant. "[O]ur cases provide affirmative support for the proposition that assessments to fund a lawful collective program may sometimes be used to pay for speech over the objection of ***some members of the group***." 521 U.S. at 472-473. [Emphasis added].

Nor has this Court implicitly agreed there need be no collective body. Respondent suggests that the Court has indirectly done so. Respondents' Brief at pp. 9-10. Though this Court granted certiorari in *Wileman Brothers* based upon a conflict with the Third Circuit's decision in *United States v. Frame,* 885 F.2d 1119 (1989), *See* 521 U.S. at 466-67, this

Court did not expressly adopt the *Frame* analysis or holding besides briefly summarizing it. That this Court considered *Frame* for purposes of conflict is not a statement that this Court approves of the holding. It is, at most, the equivalent of a summary affirmance of *Frame*. "As we stated ...the precedential effect of a summary affirmance can extend no farther than 'the precise issues presented and necessarily decided by those actions.' A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment. Questions which 'merely lurk in the record,' are not resolved, and no resolution of them may be inferred. *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979), *citations omitted.*

Nor can the Respondents' conclude that this Court has settled the issues by its denial of certiorari. Denial of a writ of certiorari in other cases is not an expression of this Court's view on the merits of those cases. This Court has repeatedly reminded the bar that denial of a writ of certiorari "imputes no expression upon the merits of the case, as the bar has been told many times." *United States v. Carver,* 260 U.S. 482, 490 (1923). "[T]he Court has definitely decided that a denial of a petition for certiorari carries no legal significance." *Elgin, Joliet, and Eastern Railway Company v. Gibson,* 355 U.S. 897 (1957) (Frankfurter, J., *concurring).* Thus, this Court's denial of the writ in the cases of *Goetz v. Glickman,* 119 S. Ct. 867 (1999) and *Cal-Almond, Inc. v. Department of Agriculture,* 119 S. Ct. 57 (1998) means only that those petitions were denied and nothing more. *See, also,* ROBERT STERN, ET AL, SUPREME COURT PRACTICE, §5.7 (7th Edition).

3. The Respondents did not counter Petitioners' arguments that the speech was ideological in that it used the Petitioners' payments with others to, in part, promote approval of the

promotion program, and, thus, influence a federally sanctioned ballot on that issue. Petition at 13.

CONCLUSION

The petition for writ of certiorari raises a question deserving of consideration by this Court and should be granted.

Dated: November 24, 1999

Respectfully submitted,

/s/_____
YALE & ASSOCIATES, CO., L.P.A.
*BENJAMIN F. YALE #0024730
KRISTINE H. REED #0066668
102 West Wapakoneta Street
P.O. Box 100
Waynesfield, Ohio 45896
(419) 568-5751
Attorneys for Petitioners

*Counsel of Record

APPENDIX H

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION:
1999 FED App. 0391P (6th Cir.)
File Name: 99a0391p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED FOODS, INC., No. 98-6436
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA;
UNITED STATES
DEPARTMENT OF
AGRICULTURE,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Tennessee at Jackson.
Nos. 96-01252; 98-01082—
James D. Todd, District Judge.

Argued: September 23, 1999
Decided and Filed: November 23, 1999

Before: MERRITT and CLAY, Circuit Judges; ALDRICH,* District Judge.

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* The Honorable Ann Aldrich, United States District Judge for the Northern District of Ohio, sitting by designation.

COUNSEL

ARGUED: Bradley A. MacLean, FARRIS, WARFIELD & KANADAY, Nashville, Tennessee, for Appellant. August E. Flentje, U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION, APPELLATE STAFF, Washington, D.C., for Appellees. **ON BRIEF:** Bradley A. MacLean, Tara L. Swafford, FARRIS, WARFIELD & KANADAY, Nashville, Tennessee, for Appellant. August E. Flentje, Barbara C. Biddle, U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION, APPELLATE STAFF, Washington, D. C., for Appellees.

OPINION

MERRITT, Circuit Judge. In this case of compelled, commercial speech challenged under the First Amendment, the Department of Agriculture requires the plaintiff, a mushroom producer, to contribute funds for advertising mushrooms, on a regional basis, as authorized by the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U. S. C. § 6101 *et seq* . [1]The District Court upheld the Act and

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[1] Enacted by Congress in 1990, the Mushroom Act states:

> It is declared to be the policy of congress that it is in the public interest to authorize the establishment

of an orderly procedure for financing through adequate assessments on mushrooms produced domestically or imported into the United States, program of promotion, search, and consumer and industry information designed to -

(1) strengthen the mushroom industry's position in the marketplace;

(2) maintain and expand existing markets and uses for mushrooms; and

(3) develop new markets and uses for mushrooms.

7 U. S. C. § 6101(b). These policy objectives are supported by findings set forth in the Act that mushrooms are not only an important food valuable to the human diet, but that they play a significant role in this country's economy and that their production benefits the environment. The Act does not permit the regulation of prices or mandatory quantity or quality controls of mushrooms produced and sold by farmers, nor does it subsidize or restrict the growth of mushrooms or otherwise collectivize the industry. It is basically a commercial advertising statute designed to assess mushroom growers for the cost of advertising. 7 C. F. R. Part 1209.40(a).

Pursuant to the Mushroom Act, the Secretary of Agriculture promulgated an Order establishing a Mushroom Council made up of mushroom producers nominated by producers and importers for appointment by the Secretary. 7 U. S. C. § 6104(b); 7 C. F. R. Part 1209. The Order generally directs the Council to "carry out programs, plans, and projects designed to provide maximum benefits to the mushroom industry." 7 C. F. R. § 1209.39(l). The Council's activities are funded through mandatory assessments on larger producers and importers of fresh mushroom products for domestic use, based upon poundage of mushrooms

the government's action compelling payments for mushroom advertising. The plaintiff claims that other mushroom producers shape the content of the advertising to its disadvantage and that the administrative process allows a majority of producers to create advertising to its detriment. The issue before us is whether the answer to the First Amendment question presented here should be the same as in the recent case of *Glickman v. Wileman Bros. & Elliott , Inc.* , 521 U. S. 457 (1997), in which the Supreme Court in a controversial 5- 4 decision[2] upheld a similar agricultural advertising program in the heavily regulated California tree fruits business (peaches, plums and nectarines). But unlike the tree fruit business in *Wileman*, the mushroom growing business in the case before us is unregulated, except for the enforcement of a regional mushroom advertising program.

The government argues that the degree of regulation or "collectivization" of an industry should make no First Amendment difference on the compelled advertising issue so long as the compelled advertising is nonpolitical and so long as the plaintiff is not restricted in its own advertising. The plaintiff contends to the contrary that the constitutionality of the compelled speech under the 1990 Mushroom Act — in light of *Wileman* — must turn on the degree of regulation of

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marketed in the United States and not to exceed a penny per pound. 7 U. S. C. § 6104(g), 7 C. F. R. § 1209.51. The Council has used these funds solely to finance generic advertising efforts on behalf of the mushroom industry.

[2] See, e. g., Nicole B. Casarez, *Don't Tell Me What to Say: Compelled Commercial Speech and the First Amendment* , 63 MO. L. REV. 929 (1998); Leading Case, *Commercial Speech —Compelled Advertising*, 111 H ARV . L. R EV . 319 (1997).

the industry. The question for us is whether the degree of government regulation of an industry controls the outcome or whether the government is right that this is irrelevant under *Wileman* .

In prior restraint and compelled speech cases involving nonbroadcast political speech, the First Amendment prohibition is nearly absolute, *Near v. Minnesota* , 283 U.S. 697 (1931), holding that newspapers have a right to publish without prior restraint, *West Virginia v. Barnett* , 319 U. S. 624 (1943), holding that schoolchildren may not be compelled to join in a flag salute ceremony, and *Miami Herald v. Tornillo*, 418 U.S. 241 (1974), holding that newspapers may not be compelled to publish a reply by political candidates. But commercial speech compelled by government is governed by a different, and as yet unsettled, set of principles which require a court to balance a number of factors according to its judgment concerning the welfare of buyers and sellers in the market place.

In the *Wileman* case, the Supreme Court emphasized and reemphasized that the compelled advertising program for California tree fruits under the Agricultural Marketing Agreement Act of 1937 contemplates "a uniform price to all producers in a particular market," a "policy of collective, rather than competitive, marketing" and an exemption from the antitrust laws in order "to avoid unreasonable fluctuation in supplies and prices." *Wileman* , 521 U. S. at 461. In his opinion for five members of the Court, Justice Stevens repeatedly "stress[ed] the importance" of the fact that the advertising takes place "as a part of a broader collective enterprise in which [the producers'] freedom to act independently is already constrained by the regulatory scheme." *Id.* at 469. In contrast, the mushroom market has not been collectivized, exempted from antitrust laws,

subjected to a uniform price, or otherwise subsidized through price supports or restrictions on supply. Except for the compelled advertising program assessing growers based on their volume of mushroom production, there appears to be a relatively free market in mushrooms, both processed and fresh.[3]

On the other side of the ledger, the government correctly argues that Justice Stevens also emphasized repeatedly in his opinion that the compelled agricultural

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[3] Justice Souter's twenty- five page dissenting opinion in *Wileman* provides an extensive history of compelled advertising in the market for agricultural commodities. His reading of the history of the agricultural regulations is that it shows that the advertising is simply the result of interest group lobbying, not a response to economic conditions. *See Wileman* , 521 U.S. at 491- 99 (Souter, J., dissenting). Justice Souter's dissent recounts that in 1952 Congress began providing for compelled advertising for an ever-expanding list of agricultural commodities. Sometimes the legislation, and the marketing orders authorized by the legislation, cover a commodity from just one section of the country — for example, California peaches but not Georgia peaches. In recent years Congress has added many farm products to the list in which compelled advertising is the main or the only form of regulation. Justice Souter explains that this comes about because of "the view of the Department of Agriculture that 'any fruit or vegetable commodity group which actively supports the development of a promotion program by this means should be given an opportunity to do so. '" *Id.* at 495- 96 (citing S. R EP . N O . 92-295, at 2 (1971)). Justice Souter concludes that these programs of compelled advertising appear to rest only on "the preference of a local interest group." *Id.* at 497. "Without more, the most reasonable inference is not of a substantial Government interest, but effective politics on the part of producers who see the chance to spread their advertising costs." *Id.* at 498.

advertising in *Wileman* is not a *restriction* on commercial advertising as in cases that have invalidated such regulation, *see, e. g.* , *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980), because separate, individual, producer advertising of tree fruits is not prohibited or restricted. *See Wileman*, 521 U. S. at 469- 70. The opinion emphasizes that the test for compelled advertising is not the same as the four-part test for restrictions on advertising set out in *Central Hudson* . *See id.* The government also correctly argues that Justice Stevens repeatedly emphasizes that no "symbolic," "ideological" or "political" speech is involved in the tree fruit advertising. *See id.* Justice Stevens' opinion sets out these various factors concisely when he says that the compelled advertising of tree fruits passes muster "because (1) the generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders [which collectivize the industry] and, (2) *in any event*, the assessments are not used to fund ideological activities." *Wileman* , 521 U. S. at 473 (emphasis added).

The question for us then is whether these two elements — (1) germaneness to a valid, comprehensive, regulatory scheme and (2) nonideological content — are independent of each other and each provide a sufficient basis for upholding compelled commercial speech. In other words, even though the mushroom advertising program before us is not "germane" to any collective program setting prices or supply, does the fact that the advertising is "nonideological" or "nonpolitical" in nature mean that it should be permitted under the First Amendment?

We do not read the majority opinion in *Wileman* as saying that any compelled commercial speech that is nonpolitical or nonsymbolic or nonideological does not warrant First Amendment protection. We conclude that the

explanation for the *Wileman* decision is to be found in the fact that the California tree fruit industry is fully collectivized and is no longer a part of a free market, as well as in the nonpolitical nature of the compelled speech. The majority uses this concept of collectivization and the nonideological nature of the advertising together. The conjunction "and" — germaneness "and" nonpolitical — is used in the Court's holding. Our interpretation of *Wileman* is that if either of the two elements is missing — either the collectivization of the industry or the purely commercial nature of the advertising — the First Amendment invalidates the compelled commercial speech, absent some other compelling justification not present in the case before us. The Court's holding in *Wileman* , we believe, is that nonideological, compelled, commercial speech is justified in the context of the extensive regulation of an industry but not otherwise. The purpose of this principle joining regulation and content is to deter free riders who take advantage of their monopoly power resulting from regulation of price and supply without paying for whatever commercial benefits such free riders receive at the hands of the government. Whether wise or unwise, or true or untrue, the legislative theory behind such extensive regulation is that the interests of producers and consumers are furthered by the monopoly powers inherent in government control of price and supply. In exchange for such power in the market place, members of the industry may have to provide certain benefits to their industry in the form of payments for nonideological advertising of industry products. If an economic actor chooses to remain aloof from the regulated industry, he owes no reciprocal duty to promote the industry; but if he chooses to join, he has a reciprocal duty to promote its interest. This principle of reciprocity designed to control free- ridership is essentially the same basis upon which the Supreme Court upheld some, and struck down other, compelled speech in the union, closed- shop context in *Lehnert v. Ferris Faculty Ass'n*

, 500 U. S. 507 (1991).

Applying this interpretation to the case at hand, we find that the context of the mushroom business is entirely different from the collectivized California tree fruit business. Mushrooms are unregulated. Hence the compelled commercial speech is not a price the members must pay under the reciprocity principle in order to further their self-interest which is regarded as arising from heavy regulation through marketing orders controlling price, supply and quality. Thus in the absence of extensive regulation, the effort by the Department of Agriculture to force payments from plaintiff for advertising is invalid under the First Amendment. The portions of the Mushroom Act of 1990 which authorize such coerced payments for advertising are likewise unconstitutional.

Accordingly, the judgment of the District Court is reversed.